ARIZONA COURT OF APPEALS
DIVISION I

The HOPI TRIBE, a federally recognized Indian Tribe, **Plaintiff/Appellant**, v. THE CITY OF FLAGSTAFF, ARIZONA, **Defendant/Appellee** and ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP **Third-Party Defendant/Appellee**.	Case No. 1 CA-CV-6-0521 Coconino County Superior Court No. S0300CV2011-00701 **APPELLANT'S OPENING BRIEF**

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Restatements

I. Statement of the Facts and Statement of the Case

This case arises from the use of reclaimed wastewater to make artificial snow at the Snowbowl Ski Resort ("the Snowbowl") located on the San Francisco Peaks ("Peaks") in the federally owned Coconino National Forest. The City of Flagstaff (the "City"), which processes sewage from the residences and businesses in Flagstaff, provides the reclaimed wastewater to Snowbowl for the express purpose of snowmaking. The Hopi Tribe ("Tribe") objects to the use of reclaimed wastewater for this purpose because it is inappropriate for the location and surroundings. The Peaks are sacred to the Hopi Tribe, and the Hopi people have frequented the area around the Snowbowl since time immemorial to conduct pilgrimages and gather natural resources required for Hopi ceremonies, which must be pure to be suitable for use in sacred events. Hopi practitioners have already been forced to alter their trips or forego certain ceremonies and pilgrimages because of the contamination.

The Tribe has alleged that spraying reclaimed wastewater in the Snowbowl area will cause a public nuisance, both because of the cultural and spiritual harms to the Tribe, but also because of the wider harm to the public due to fouling of the pristine environment near the Snowbowl, including in the Kachina Peaks Wilderness Area, which surrounds the Snowbowl on three sides. The Hopi Tribe has alleged that bringing reclaimed wastewater into direct contact with people, especially

children and other sensitive populations, is injurious to the public. After the City filed a third-party complaint against Arizona Snowbowl Resort Limited Partnership ("Snowbowl"), Snowbowl moved to dismiss the Tribe's complaint under Rule 12(b)(6), which the Superior Court granted.

A. The Peaks and the Reclaimed Wastewater

Nuvatukya'ovi, known as the Peaks, which includes the Snowbowl Resort Area, consist of diverse ecosystems, Appendix ("APP.") 3 ¶ 91, and are a vital and central component of the way of life for members of the Hopi Tribe, *id.* ¶ 116. The Peaks are the "single most important sacred place the Hopi have," *id.* ¶ 115, and "mark a cardinal direction defining the Hopi universe," *id.* ¶ 118. The Hopi Tribe has been living in Arizona for centuries, *id.* ¶ 114, and its members "have been making regular pilgrimages to the Peaks since before recorded history," *id.* ¶ 116. Tribe members have frequented the Peaks for prayers, and used the diverse Peaks ecosystem to "collect water, greens, and herbs for the ceremonies." *Id.* ¶ 115. Members of the Tribe use areas and natural resources "throughout the vicinity of the Snowbowl Resort Area, along Snowbowl Road and the Inner Basin," *id.* ¶ 129, to facilitate ceremonies conducted and experienced by members of the Tribe, *id.* ¶¶ 126-28. The Hopi people use specific locations to conduct religious and cultural activities such as the "Lakonva," a sacred spring on the west side of the Peaks that is used by members of a women's society. *Id.* ¶ 125. Other locations include the

"Hart Prairie at the base of the Snowbowl Resort Area [which] is a tipkya (or 'womb') that the Hopi consider to be the spiritual birthing place of the Kachina . . . . This prairie has been sacred to and traditionally used by the Hopi for hundreds of years." *Id.* ¶ 124. These uses have been impacted by snowmaking with reclaimed wastewater at Snowbowl—including reduction in pilgrimages, the interruption of ceremonies, and the cessation of gathering necessary natural materials for religious events. *See* Index of Record # ("IR#") 198, Exhibit 1.

The United States government recognizes the deep significance of the Peaks and the Snowbowl Resort Area to the Hopi Tribe. APP.3 ¶ 130. Congress memorialized the vital role of the Peaks for the Hopi Tribe by renaming the San Francisco Peaks Wilderness Area, which surrounds the Snowbowl Resort Area on three sides, the "Kachina Peaks Wilderness Area." Arizona Wilderness Act of 1984, Pub. L. No. 98-406, §101(a)(22), 98 Stat. 1485 (1984). This change was specifically made "to reflect the deep Hopi religious significance of the area," and in recognition that "[r]eligious practices and herb gathering are still conducted on the mountain" by the Tribe. 130 Cong. Rec. H8908 (Aug. 10, 1984) (Statement of Rep. Udall); APP.3 ¶¶ 103-04. The centrality of the Peaks and the Snowbowl Resort Area to the identity of the Hopi Tribe is widely and openly acknowledged.

The Peaks and the Snowbowl Resort Area are also an important public resource. The Peaks "are ecologically significant, containing rare types of habitat

and numerous threatened, endangered, and sensitive species." APP.3 ¶ 92. The Peaks are the "exclusive[]" home to "Rare Alpine Confer Forests" that are already jeopardized by developments "such as ski runs, communication towers, and observatories." *Id.* ¶ 96. The State of Arizona and the United States have recognized the importance of this habitat and the rare species that live there. *Id.* ¶¶ 95-100.

Despite the ecological, religious, and cultural significance of the Peaks, the City has been providing reclaimed wastewater to the Snowbowl Ski Resort located within the Peaks for the express purpose of making artificial snow. The first reclaimed wastewater was provided by the City to Snowbowl in 2012.

This reclaimed wastewater poses a threat to the purity and sanctity of the areas and natural resources used by the Tribe for religious and cultural purposes. Reclaimed wastewater is "'treated sewage effluent' that has been processed through the City's wastewater treatment plants." Index of record ("IR#") 55 at 2 ¶ 3. It is religiously impure and "contains recalcitrant chemical components that are not degraded or removed in the wastewater treatment process," some of which "are harmful to animal populations" and humans. APP.3 ¶ 40; *see also id.* ¶¶ 41, 43-48. "Studies of reclaimed wastewater from the Rio de Flag Treatment Plant"—the facility supplying the reclaimed wastewater that goes to the Snowbowl—have "found detectable levels of contaminants including human drug compounds, human and veterinary antibiotics, and industrial and household wastes." *Id.* ¶ 44.

Yet, each winter, more that 180 million gallons of the City's reclaimed wastewater accumulates in open access areas, runs off into the surrounding Kachina Peaks Wilderness Area, and results in human contact both in and outside the boundaries of the Snowbowl Resort Area. APP.3 ¶¶ 77, 81-82, 85-86. The reclaimed wastewater is a conduit for "numerous chemicals that are not degraded or removed in the wastewater treatment process" to be introduced into "the areas in the Snowbowl Resort Area and its vicinity that have been a part of Hopi use for ceremonial pilgrimages and hunting and gathering trips for centuries." *Id.* ¶ 135. Additionally, "[n]atural resources that the Hopi collect, as well as shrines, sacred areas, and springs on the Peaks" have "come into contact with the blown reclaimed wastewater." *Id.* ¶ 138.

The presence of reclaimed wastewater has desecrated the sacred sites used by Tribe members and contaminated pristine natural objects central to Hopi cultural and religious life. *Id.* ¶ 115. "The purity of the ceremonial objects collected by members of the Hopi Tribe during pilgrimages is of particular importance. These objects cannot be used for ceremonial purposes if they are tainted or impure." *Id.* ¶ 131; IR#198, Exh. 1. Therefore, the sale and use of reclaimed wastewater for making artificial snow "cause[s] Hopi practitioners to stop using the areas they have traditionally used," APP.3 ¶ 138, and results in "harms to the Hopi Tribe, its members, the unique environmental resources, and the public," *id.* ¶ 193.

B. Procedural History

The Hopi Tribe filed its Complaint against the City of Flagstaff on August 19, 2011. APP.3. The City responded with a motion to dismiss the complaint, IR#19, which the Superior Court granted, IR## 32, 43. The Hopi Tribe appealed that decision to this Court, which reversed the dismissal of the Tribe's public nuisance claim. IR#55. After remand to the Superior Court, the City filed a third-party complaint against the Snowbowl. IR#79.

Between the time the case was remanded to the Superior Court in 2014 to 2016, the parties engaged in serious settlement negotiations, *see* IR## 71, 83, 86, 96, 98, 99, 102, 105; during which time the Superior Court granted a number of extensions to the litigation schedule, *see* IR## 66-69, 84, 87, 88, 92, 97, 101, 104, 107. After negotiating a settlement in principal that was recommended to both the City and Tribal Councils by the negotiating principals, and completing pilot testing on the proposed additional treatment technology, *see* IR#105, the Hopi Tribal Council unanimously approved the settlement agreement, IR#117 at 3. Two weeks later, the City Council considered the settlement agreement, but did not approve it, IR#122 at 3, and the next month tabled any further decision on the settlement agreement, IR#163 at 12; IR#162 at 10, effectively ending the settlement discussions.

While the settlement in principal was being finalized for consideration by the Hopi Tribal Council and the Flagstaff City Council, the Snowbowl filed a motion to dismiss the Hopi Tribe's public nuisance claim against the City, IR#109, which the City later joined, IR#127. Snowbowl argued, in part, that the Hopi Tribe lacks standing to prosecute the nuisance claim because "the right to enjoy the Peaks in pristine natural surroundings is a right enjoyed by all," and so the Tribe has not suffered special injury. IR#109 at 6.

In opposition to Snowbowl's motion, the Tribe argued that it had sufficiently pled special injury supporting its standing to maintain the public nuisance claim under Arizona law, citing the specific allegations in the complaint about uses of the Peaks and disruption in ceremonies and pilgrimages to sacred sites as a result of the City's and Snowbowl's actions. *See* IR#128 at 8-13. The Tribe also showed that Snowbowl's motion was procedurally improper because, in asserting a "*derivative* defense, third-party defendants cannot place themselves in a better position than that held by the defendant," and the arguments made by Snowbowl either had already been raised by the City and held to be unpersuasive by this Court, or were waived by the City. *Id.* at 4-8.

On August 12, 2016, the Superior Court granted Snowbowl's motion to dismiss, finding that the Tribe's "provide[d] no evidence" of "irreparable and substantial harm" or "unreasonable harm," despite alleging such harm in the

Complaint. APP.39 at 8. The Superior Court dismissed the Tribe's request for injunctive relief, finding that under "all of the circumstances" present in this matter, the harm to the Tribe is not substantial enough to warrant an injunction. *Id.*

The Superior Court also concluded that the Tribe cannot recover damages for the public nuisance because the Tribe has not suffered a "special injury" as "other members of the public share the same rights and concerns about preserving our environment, and keeping it free of pollution or being desecrated. The public also share the same right of access to and enjoyment of the Peaks wilderness area as the Hopi." APP.39 at 9. As to the spiritual and religious harms to the Hopi Tribe and its members, the Court found that "the practical effect on Hopi's ability to conduct ceremonies has not been substantially impacted, that the religious significance of The Peaks is not unique to Hopi, and this claim is tied directly to the alleged environmental damage." *Id.* As a result, the Court concluded that the Tribe lacked standing to maintain its damages claim.

Thereafter, the Tribe filed a motion for reconsideration and requested the opportunity to file an amended complaint to correct the perceived deficiencies in the Complaint. IR#150. The Superior Court denied this request, APP.50, and the Tribe filed a timely notice of appeal, IR#183.

On September 1, 2016, Snowbowl moved for recovery of its attorneys' fees, IR#151, and on September 2, 2016, the City followed suit, IR## 152-53. The

motions for attorneys' fees claimed that the City and third-party defendant Snowbowl were entitled to recovery of attorneys' fees under Arizona Revised Statutes ("ARS") section 12-341.01(A), and that both parties' fees should be charged to the Tribe. IR#151 at 2, IR#153 at 2. In supporting its application for attorneys' fees, Snowbowl selectively quoted various allegations from the Tribe's complaint that referenced the contract between the City and Snowbowl for sale of reclaimed wastewater, *see* IR#151 at 3-4; *see also* IR#153 at 3, but failed to acknowledge that the complaint cited by Snowbowl also included a claim for illegal contract that was no longer at issue after the first appeal and remand to the Superior Court, *see* APP.3 ¶¶ 159-76; IR#55 at 26 ¶ 46. Snowbowl also argued that it was the successful party and thus entitled to recover fees against the Hopi Tribe, even though the Tribe never filed a claim against Snowbowl. IR#151 at 7.

The Tribe opposed the motions, arguing that the claim did not arise out of a contract dispute, and so ARS § 12-341.01(A) does not apply. IR#162 at 3-8; IR#163 at 3-8. The Tribe further showed that Snowbowl had not met its burden to prove the amount and reasonableness of the fees claimed, IR#163 at 8-9, and had improperly included fees related solely to defense of the City's third-party claim against it, *id.* at 9-10. The Tribe also argued that the City was not the prevailing party, as it had not advanced any defense that was adopted by the Superior Court. IR#162 at 8-9. Finally, the Tribe showed that the factors set forth in *Associated Indemnity Corp. v.*

Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985), warranted denial of the requests, IR#162 at 9-12; IR#163 at 10-13. The Court granted the motions, and entered a judgment dismissing the Tribe's claims and awarding $302,169.45 in attorneys' fees to Snowbowl and $18,887.44 to the City. APP.57.

On December 27, 2016, the City, however, filed a motion to amend the judgment, requesting an *additional* $209,637.00 in attorneys' fees on top of the $18,887.44 already awarded. IR#190. No reason was given for the delay in submission of the newly requested fees, most of which was incurred prior to the first appeal and remand. The Tribe again opposed the request. IR#198. The Superior Court again granted the City's motion, APP.50 at 2-5, and entered an amended judgment that increased the City's fee recovery to $221,251.44, APP.65. The Tribe filed timely notices of appeal. IR#207; IR#210.

In sum, the following rulings by the Superior Court have been appealed by the Tribe and are ripe for consideration by this Court:

- August 12, 2016 Order Granting Snowbowl's Motion to Dismiss (APP.39)
- November 8, 2016 Order Denying the Tribe's Motion for Reconsideration / Clarification and Granting the City's and Snowbowl's Motion for Attorney's Fees (APP.50)
- December 12, 2016 Judgment (APP.57)
- January 19, 2017 Order Granting the City's Motion to Amend the Judgment (APP.61)
- February 22, 2017 Amended Judgment (APP.65)

C. Jurisdiction

The Arizona Court of Appeals has jurisdiction over the Tribe's claims against the City pursuant to ARS sections 12-120.21 and 12-2101. ARS §§ 12-120.21(A)(1) & (A)(3); ARS §§ 12-2101(A)(1) & (5)(b).

The Superior Court entered an Under Advisement Ruling dismissing the Tribe's public nuisance claim and request for injunction on August 12, 2016. APP.39. The Tribe properly filed a Notice of Appeal in the Superior Court on September 8, 2016, IR#155, and a Case Management Statement in the Court of Appeals on October 6, 2016.

The Superior Court subsequently issued a final judgment dismissing the Tribe's public nuisance claim and entire complaint under Arizona Rule of Civil Procedure 12(b)(6), denying the Tribe's Rule 59 Motion for Reconsideration, and awarding the City and Snowbowl attorneys' fees pursuant to ARS § 12-341.01(A) on December 12, 2016. APP.57. The Tribe filed a Notice of Appeal of this decision on December 30, 2016. IR#191. The Superior Court granted a subsequent request by the City to amended the Judgment to include additional attorneys' fees in a January 19, 2017 Order. APP.61. The Tribe filed timely Notices of Appeal of the December 12, 2016 Judgment, IR#191, of the Order amending Judgment, IR#207, and of the Amended Judgment reflecting the additional fees awarded to the City, IR#210.

II. Statement of the Issues on Appeal

1. Does the Hopi Tribe's Complaint allege facts sufficient to state a claim for injunctive relief to abate a public nuisance?

2. Does the Hopi Tribe have standing to assert a claim for public nuisance based on the use of reclaimed wastewater for snowmaking at the San Francisco Peaks?

3. Would amendment of the complaint necessarily be futile such that leave to amend should not be granted?

4. Does the Hopi Tribe's public nuisance claim "arise out of contract" for purposes of fee shifting under ARS § 12-341.01?

5. Was the Superior Court's fee award reasonable where it included significant amounts unrelated to the Tribe's claims and was based on block-billing, redacted time entries, and filings riddled with errors?

III. Standard of Review

A. The Court Reviews Dismissal of the Tribe's Complaint De Novo and May Be Affirmed Only If the Tribe's Public Nuisance Claim Fails Under "Any Interpretation of the Facts Susceptible of Proof".

This Court reviews *de novo* the Superior Court's order granting the Snowbowl's Rule 12(b)(6) motion to dismiss. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8, 284 P.3d 863, 867 (2012). A public nuisance is defined by Arizona law as "any unreasonable interference with a right common to the general public." *Armory Park Neighborhood Ass'n v. Episcopal Commt'y in Ariz.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985).

> In determining whether the acts constitute a nuisance, the court should consider all the circumstances including the locality and character of the surroundings, the nature of the defendant's business and the manner in which it is conducted, the value to the community of the defendant's

> activities, the defendant's ability to reduce the harm, and the extent to which the defendant would be damaged by an injunction and the plaintiff damaged by the failure to enjoin. The court can also consider priority of use.
>
> In sum, the court looks at the reasonableness of the defendant's activities in the locality. This involves a balancing test.

McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312, 314, 543 P.2d 150, 152 (1975) (internal citations omitted).

Once a public nuisance is found, the Court then must exercise its equitable powers to determine the appropriate injunctive relief, *Silvas v. GMAC Mortgage, LLC*, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at *6 (D. Ariz. Dec. 1, 2009), *as amended* (Jan. 5, 2010) (explaining that injunctive relief is an equitable remedy and not a cause of action), weighing the circumstances and balancing the equities of the case. *See Thienes v. City Ctr. Exec. Plaza, LLC*, 1 CA-CV 14-0077, 2016 WL 5219858, at *13 ¶ 57 (Ct. App. Sept. 22, 2016) review denied (Mar. 14, 2017) (discussing a "compromise remedy"); *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 205-07, 100 P. 465, 470-71 (Ariz. 1909), *aff'd*, 230 U.S. 46 (describing the court's creative solution); *McQuade*, 25 Ariz. App. at 314, 543 P.2d at 152 (discussing limiting the scope of the injunction were possible "if a less measure of restraint will afford the relief to which the plaintiff is entitled." (internal quotation omitted)).

The Court also reviews the Superior Court's determination that the Tribe lacks standing to maintain a damages claim for the public nuisance claim *de novo*.

Standing is a question of "prudential or judicial restraint," *Armory Park*, 148 Ariz. at 6, 712 P.2d. at 919, and courts will recognize standing where, "given all the circumstances in the case, the [plaintiff] has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted," *id*. In order to recover damages for harm from a public nuisance, courts require that the plaintiff suffer damage that is "different in kind or quality from that suffered by the public in common." *Id.* at 5, 712 P.2d at 918.

Dismissal is appropriate "only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Foley v. Arizona Dep't of Corr.*, 1 CA-CV 14-0280, 2015 WL 3618818, at *1 ¶ 5 (Ct. App. June 9, 2015) (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶ 4, 954 P.2d 580, 582 (1998)). Arizona law requires only "[a] short and plain statement of the claim showing that the pleader is entitled to relief," Ariz. R. Civ. P. 8(a), that gives the defendant "fair notice of the allegations as a whole," *Kline v. Kline*, 221 Ariz. 564, 571 ¶ 28, 212 P.3d 902, 909 (Ct. App. 2009) (internal quotation omitted). On a motion to dismiss, the Court "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts," *Coleman*, 230 Ariz. at 356 ¶ 9, 284 P.3d at 867, and may not dismiss the complaint unless there is no set of facts under which plaintiff would be entitled to relief. *Folk*

v. City of Phoenix, 27 Ariz. App. 146, 151, 551 P.2d 595, 600 (Ct. App. 1976); *Coleman*, 230 Ariz. at 356 ¶ 18, 284 P.3d at 867.

Finally, the Court reviews the Superior Court's determination that amendment of the Complaint would have been futile *de novo*. *See Aubuchon v. Brock*, 2015 WL 2383820, at *3 ¶ 13 (Ct. App. May 14, 2015); *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).[1] "[L]eave to amend should be granted unless the court determines that the pleading could not possibly be cured by the allegation of other facts." *Levine v. Safeguard Health Enter., Inc.*, 32 F. App'x 276, 278 (9th Cir. 2002) (emphasis added, internal quotations omitted).

B. The Court Reviews the Application of ARS § 12-341.01 to Shift the City's and Snowbowl's Attorneys' Fees to the Tribe De Novo and the Reasonableness of the Award Is Reviewed for Abuse of Discretion.

Whether ARS § 12-341.01 authorizes a fee award is a question of statutory interpretation and is reviewed *de novo*. *Hanley v. Pearson*, 204 Ariz. 147, 149 ¶ 5, 61 P.3d 29, 31 (2003). Section 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." When a cause of action "sounds in tort" and "would exist

[1] "Because Arizona's rule came from the federal rule, we turn to . . . the Federal Rules of Civil Procedure and the federal cases interpreting this rule since we give great weight to federal interpretation of the Federal Rules of Civil Procedure." *Hedlund v. Ford Mktg. Corp.*, 129 Ariz. 176, 178, 629 P.2d 1012, 1014 (Ct. App. 1981); *see also Camasura v. Camasura*, 238 Ariz. 179, 183 ¶ 13, 358 P.3d 600, 604 (Ct. App. 2015) ("Arizona courts generally accord great weight to the federal interpretations of the rules") (citing *Hedlund*).

even without the contract," ARS § 12-341.01 does not apply even if the relationship between the parties is due solely to a contract. *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 523 n.1, 747 P.2d 1218, 1222 (Ariz. 1987) (in banc); *see also Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, 134 ¶ 16, 60 P.3d 708, 713 (Ct. App. 2003) (holding that even though the parties relationship to each other arose from a purchase agreement signed between one of them and a third-party, ARS § 12-341.01 did not apply because "common products liability lawsuit does not arise out of contract."); *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325-26, 856 P.2d 1201, 1203-04 (Ct. App. 1993) (holding that ARS § 12-341.01 did not apply to a case involving a lemon law claim, even though the parties relationship arose from the lease agreement, because the contract was not the focus of the claim); *Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 83, 761 P.2d 155, 157 (Ct. App. 1988) (holding that although claim for materialman's lien was due to breach of underlying contract, the claim did not arise out of contract for purposes of ARS § 12-341.01). "The legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship." *Robert E. Mann Constr.*, 204 Ariz. at 134 ¶ 16, 60 P.3d at 713.

Finally, the Superior Court's determination of the proper amount of an attorneys' fee award is reviewed for abuse of discretion, *Rowland v. Great States*

Ins. Co., 199 Ariz. 577, 587 ¶ 31, 20 P.3d 1158, 1168 (Ct. App. 2001), *as corrected* (May 24, 2001) and will be overturned where the reasons given by the court are "clearly untenable, legally incorrect, or amount to a denial of justice." *Ad Hoc Comm. of Parishioners v. Reiss*, 223 Ariz. 505, 518 ¶ 40, 224 P.3d 1002, 1015 (Ct. App. 2010).

III. Argument

A. The Superior Court Wrongly Dismissed the Tribe's Public Nuisance Claim

In its August 12, 2016 Under-Advisement Ruling, the Superior Court dismissed the Tribe's public nuisance claim because it concluded that the Tribe had not alleged facts showing it has suffered a special injury sufficient to maintain standing for the public nuisance claim, APP.39 at 8-9, and that under "all of the circumstances," the injury alleged by the Tribe "is not unreasonable" and is unlikely to "result in irreparable harm," *id.* at 8. Although the Tribe's complaint clearly contains such allegations and was sufficient under Arizona's notice pleading requirements, the Tribe nevertheless requested permission to amend the Complaint under Rule 15 to meet the Superior Court's heightened requirements. IR#132, 150. The Court denied this request as well. APP.50 at 1-2.

1. The Superior Court Wrongly Dismissed the Tribe's Public Nuisance Claim and Request for Injunctive Relief

The Superior Court concluded that the Hopi Tribe is not entitled to injunctive relief to abate the public nuisance because it has "provide[d] no evidence" of "substantial and irreparable harm," and because any such harm is not "tangible and immediate," but rather "mere annoyance or inconvenience." APP.39 at 8. The Superior Court further concluded that "[g]iven all of the circumstances . . . the use of reclaimed wastewater by Snowbowl is not unreasonable or illegal under the circumstances . . . ." *Id.* As shown by a fair reading of the Complaint, the Tribe has sufficiently pled the necessary elements of a public nuisance. *Coleman*, 230 Ariz. at 356 ¶ 9, 284 P.3d at 867 (requiring the court to "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" (internal quotation omitted)). To the extent that the Superior Court's ruling is based on weighing the evidence to determine the availability of injunctive relief to abate the nuisance, that determination is inappropriate at the motion to dismiss stage.

a. The Tribe's Complaint Alleges Facts Sufficient to Support Its Public Nuisance Claim

The Superior Court improperly dismissed the Tribe's claim for injunctive relief, concluding that "the use of reclaimed wastewater by Snowbowl is not unreasonable or illegal under the circumstances . . . ." APP.39 at 8. The Complaint includes allegations that are sufficient to state a claim for public nuisance, which is

defined by Arizona law as an "unreasonable interference with a right common to the general public" that affects "a considerable number of people." *Armory Park*, 148 Ariz. at 4, 712 P.2d at 917; *see also* Restatement (Second) of Torts ("Restatement") § 821B. Arizona courts "generally use[] a balancing test in deciding the reasonableness of an interference . . . [and] look at the utility and reasonableness of the conduct and balance these factors against the extent of harm inflicted and the nature of the affected neighborhood." *Armory Park*, 148 Ariz. at 7–8, 712 P.2d at 920–21. Factors affecting reasonableness include:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement § 821B.

Public nuisance is "incapable of precise definition," *Mutschler v. City of Phoenix*, 212 Ariz. 160, 166 ¶ 20, 129 P.3d 71, 77 (Ct. App. 2006), and there is "no rigid rule to be applied in all instances," *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 185, 494 P.2d 700, 707 (Ariz. 1972). Arizona courts have enjoined public nuisances under a variety of circumstances. For example, the Supreme Court of Arizona found that cattle feeding operations that produced odor and flies near a new development could be enjoined from expansion and operation as a public

nuisance. *Id.* at 184, 494 P.2d at 706. Another court applying Arizona law found a public nuisance where a defendant contaminated the groundwater near plaintiffs' homes with trace amounts of an organic solvent. *Yslava v. Hughes Aircraft Co.*, No. CIV-91-525-TUC-ROS, 1998 WL 35298580 at *1, *13-14 (D. Ariz. June 29, 1998). The Arizona Supreme Court has noted that "lowflying planes, the spreading of excessive quantities of dust, and the establishment of airports in the immediate vicinities of homes and schools are all subjects for injunctive relief," because they variously "interfered with the sleep and rest" of children at a summer camp and "interrupted other activities of the camp in that it prevented voices from being heard and distracted the minds of the children," created and spread "dust [that] permeate[d] the atmosphere around a neighboring home," and lead to "the apprehension of danger arising from low-altitude flights." *Brandes v. Mitterling*, 67 Ariz. 349, 357, 196 P.2d 464, 469 (Ariz. 1948) (favorably quoting other cases). Thus, the type of harms giving rise to public nuisance vary and are often case-specific, causing the Arizona Supreme Court to recognize that "[f]rom time out of mind the term 'nuisance' has been regarded as incapable of precise definition, because the controlling facts are seldom alike, and each case stands upon its own footing." *Engle v. Scott*, 57 Ariz. 383, 388, 114 P.2d 236, 238 (1941).

Here, the Tribe's Complaint has alleged facts, that, viewed in the light most favorable to the Tribe, show real harms suffered by the public and the Tribe due to

contamination by reclaimed wastewater. These allegations are sufficient to withstand a motion to dismiss. It is erroneous to determine that, as a matter of law, the snowmaking at the Snowbowl from reclaimed wastewater does not state a claim for public nuisance.

In particular, the allegations in the Complaint show that a substantial, irreparable, and unreasonable harm exists because of the environmental and cultural significance of the Peaks and the recurrent, permanent, and certain impacts to the Peaks from the use of reclaimed wastewater for snowmaking. The Complaint describes the significance of the Peaks to the Tribe and public at large. APP.3 ¶¶ 91-104. The allegations in the Complaint that detail the pilgrimages to the Peaks, *id*. ¶ 126, and the breadth of natural objects obtained from the Snowbowl Resort Area, *id*. ¶ 127, are sufficient to state a claim based on "significant harm" by properly alleging the disruption to the routines of Hopi cultural and religious life. Restatement § 821F cmt. c. The allegation that "[a]rtificial snow made with reclaimed wastewater will introduce numerous chemicals that are not degraded or removed in the wastewater treatment process . . . to the areas in the Snowbowl Resort Area and its vicinity that have been a part of Hopi use for ceremonial pilgrimages and hunting and gathering trips for centuries," APP.3 ¶ 135, states harm that is "more than slight inconvenience or petty annoyance." Restatement § 821F cmt. c. Indeed, the Complaint clearly states a "real and appreciable invasion of the

[Tribe's] interests," Restatement § 821F cmt. c, based on the allegations of significance of specific location on the Peaks to the Tribe's identity, APP.3 ¶¶ 115-16, and that the presence of the reclaimed wastewater supplied by the City "cause[s] Hopi practitioners to stop using the areas they have traditionally used," *id*. ¶ 138.

Further, the Complaint properly alleges the enormity and "recurrence of the interference" results in both a substantial and irreparable harm to the Tribe and the public. Restatement § 821F cmt. g. The Complaint alleges that every year "the City will provide to the Snowbowl up to 1.5 million gallons of reclaimed wastewater every day from November to February," APP.3 ¶ 68, which "contains recalcitrant chemical components that are not degraded or removed in the wastewater treatment process." *Id*. ¶ 40. Additional allegations discuss the repeated and lingering "presence of artificial snow," which "will permanently compromise the pristine nature of these areas," *id*. ¶ 194, because it will blow and runoff "beyond the boundaries of the application area and the Snowbowl Resort Area," *id*. ¶¶ 106-07, 111, and result in the "release of various pollutants . . . [that] will harm, the environment," *id*. ¶ 186. The Complaint properly alleges that the recurrent presence of these pollutants has a negative impact on the Tribe's and the public's ability to enjoy the unique and pristine environment around the Snowbowl Resort Area. *Id*. ¶ 194.

Additionally, the harms to the environment, public, and the Tribe as alleged in the Complaint are "permanent [and] long-lasting." Restatement § 821B(2)(c). The Complaint states that there will be substantial disruption to the Tribe's religious and cultural practice because the ceremonial objects collected by members of the Hopi Tribe "cannot be used for ceremonial purposes if they are tainted or impure." APP.3 ¶ 131. The effects of the sale of reclaimed wastewater for the purpose of making artificial snow are permanent because the exposure of natural items to the contaminated water and snow will forever taint the natural objects and areas used by the Hopi Tribe, *id*. ¶ 115, 131, and once the recalcitrant chemicals contained in the City's reclaimed wastewater are disseminated throughout the ecosystem, the impacts are difficult, if not impossible, to reverse. Thus, the Tribe alleges that "the presence of artificial snow will permanently compromise the pristine nature of these areas. These permanent alterations will affect the use and enjoyment of the Peaks by the Hopi and other direct users, as well as by the public at large." *Id*. ¶ 194.

These allegations of harm to the environment are not "speculative" as the Superior Court suggests. *See* APP.39 at 8. The Complaint alleges dangers posed by the presence of chemicals in reclaimed wastewater, explaining that the reclaimed wastewater supplied by the City to Snowbowl for the purpose of making artificial snow contains recalcitrant chemicals, APP.3 ¶¶ 39-40, including "endocrine disruptors" that "interfere with natural hormone levels in animals and humans," *id.*

¶ 41. "Studies of reclaimed wastewater from the Rio de Flag Treatment Plant found detectable levels of contaminants including human drug compounds, human and veterinary antibiotics, and industrial and household wastes." *Id.* ¶ 44. The Complaint also alleges environmental harms specifically resulting from the reclaimed wastewater supplied by the City of Flagstaff that include adverse effects on feeding behavior, *id.* ¶ 45, adverse effects on tadpole development, *id.* ¶ 46, and known adverse effects from elevated levels of nitrogen which are present in the reclaimed wastewater from Rio De Flag, *id.* ¶¶ 47-48. These allegations of real dangers to the environment can hardly be viewed as "speculative," and instead allege concrete and foreseeable harm. The Complaint also properly alleges immediate and already occurring harms to the natural resource services provided by the area to the Hopi Tribe. As shown below, *infra* 39, the Tribe's members have already been forced to alter religious practices that have been observed since time immemorial.

The Complaint also alleges sufficient facts to show that the "extent of harm inflicted" to the public's and the Tribe's right to use and enjoy the pristine natural environment, free from dangerous chemicals, *id.* ¶ 190, 194, far outweighs "the utility and reasonableness" of the use of reclaimed wastewater for making artificial snow at Snowbowl. *Armory Park*, 148 Ariz. at 8, 712 P.2d at 921. In its Complaint the Tribe explains that Snowbowl's "expansion plan will result in a relatively small increase in profits for the Snowbowl while imposing a great cost on the users of the

San Francisco Peaks, including the Hopi Tribe." APP.3 ¶ 33. The Tribe's Complaint further alleges that reclaimed wastewater provided by the City contains "detectable levels of contaminants." *Id.* ¶ 44; *see also id.* ¶¶ 40-41, 43, 45-48 (examples of environmental harm resulting from chemicals found in reclaimed wastewater to environmental resources). The presence of these chemicals poses a threat to the delicate and "unique environmental resources" around the Snowbowl Resort Area. *Id*. ¶ 193. The Complaint alleges that the threat exists because the artificial snow made from reclaimed wastewater sold by the City will blow and runoff "beyond the boundaries of the application area and the Snowbowl Resort Area," *id*. ¶ 111, *see also* ¶¶ 106-07, 109-10, and will result in the "release of various pollutants" that "will harm, the environment." *Id*. ¶ 186. The Tribe thus alleges that the presence of these compounds results in "significant interference with the public health," Restatement § 821B(2)(a), because snowmaking "does not reasonably preclude human contact with reclaimed wastewater," APP.3 ¶ 87. In fact, the sale of reclaimed water violates provisions of Arizona law designed to protect the public health. *Id*. ¶¶ 74, 79-83, 87; *see also* Restatement § 821B(2)(b).

Thus, under the proper standard of review on a motion to dismiss, assuming all facts as alleged and making all reasonable inferences in favor of the Tribe, the Complaint properly sets out a claim for public nuisance, particularly under Arizona's notice pleading standard, *see Kline*, 221 Ariz. at 571 ¶ 28, 212 P.3d at 909. The

allegations in the Complaint detail a substantial, irreparable, and unreasonable interference with the public's and the Tribe's use and enjoyment of the Peaks due to the repeated and long-lasting effects that the City's reclaimed wastewater has had and will continue to have on the environment in and around the Snowbowl Resort Area. The Superior Court's decision to dismiss the Tribe's public nuisance claim because the allegations of public nuisance were insufficient was therefore improper and should be reversed.

b. The Superior Court Improperly Weighed the Circumstances of the Case to Decide that the Tribe Is Not Entitled to Injunctive Relief to Abate the Public Nuisance

The Superior Court incorrectly made factual determinations at the motion to dismiss stage when it weighed the evidence and equities in determining that injunctive relief is not available to the Tribe. APP.39 at 8. This was improper because the court is precluded from addressing questions of fact on a motion to dismiss. *Coleman v. City of Mesa*, 230 Ariz. 352, 363, ¶ 46, 284 P.3d 863, 874 (2012) ("In adjudicating a Rule 12(b)(6) motion to dismiss…a court does not resolve factual disputes between the parties on an undeveloped record"); *see also Solid 21, Inc. v. Breitling USA, Inc.*, 513 F. App'x 685, 687 (9th Cir. 2013) ("the inquiry under Rule 12(b)(6) is into the adequacy of the pleadings, not the adequacy of the evidence."). A "court cannot properly balance the equities when there is no adequate factual record on which to do so." *Freestone v. Cowan*, 68 F.3d 1141, 1156 n.14

(9th Cir. 1995), *vacated on other grounds sub nom. Blessing v. Freestone*, 520 U.S. 329 (1997).

In deciding whether a permanent injunction is appropriate, the court must weigh the circumstances of the case and balance the equities. *See Armory Park*, 148 Ariz. at 7–8, 712 P.2d at 920–21 (describing the balancing of "the utility and reasonableness of the conduct" against the "the extent of harm inflicted and the nature of the affected [area]" in determining whether to enjoin a public nuisance); *see also* Restatement § 821B (providing factors that may be relevant in balancing the equities in public nuisance cases); *Spur Industries*, 108 Ariz. at 184, 494 P.2d at 706 (describing that an activity may be a nuisance by virtue of its "locality and surroundings" and "may in another place and under different surroundings be deemed proper and unobjectionable."); *McQuade*, 25 Ariz. App. at 314, 543 P.2d at 152 ("In sum, the court looks at the reasonableness of the defendant's activities in the locality. This involves a balancing test."). This cannot be done before the facts of the situation are presented because, at the motion to dismiss stage, "there is no adequate factual record on which to do so." *Freestone*, 68 F.3d at 1158 n.13 (9th Cir. 1995); *see also Silving v. Wells Fargo Bank, NA*, 800 F. Supp. 2d 1055, 1064 (D. Ariz. 2011) (explaining that the court "will decline to address" an "issue of fact . . . at the motion to dismiss stage."). Nevertheless, this is what the Superior Court did just that. *See* APP.39 at 8 (describing the Superior Court's evaluation of the

weight of the injury to the Tribe and conclusions that it is not "tangible" or "immediate" but rather "mere annoyance or inconvenience" and concluding that "[g]iven all of the circumstances" the snowmaking "is not unreasonable or illegal under the circumstances").

Balancing of the equities at the motion to dismiss stage is inappropriate not only because it requires factual inquiries and evaluation of the equities, but also because it is premature. Injunctive relief is a remedy for an underlying cause of action, not a separate cause of action in and of itself, *Silvas*, 2009 WL 4573234, at *6, and the court has the power to "fashion[] a compromise remedy," *Thienes*, 2016 WL 5219858, at *13 ¶ 57, that abates the nuisance while preserving the non-offensive aspects of the business. *See Arizona Copper Co.*, 12 Ariz. at 205-07, 100 P. at 470-71 (describing the fashioning of a creative injunction); *McQuade*, 25 Ariz. App. at 314, 543 P.2d at 152 (discussing limiting the scope of the injunction were possible "if a less measure of restraint will afford the relief to which the plaintiff is entitled." (internal quotation omitted)). The Superior Court did not find that Tribe failed to state a claim, but rather that the Tribe would not be entitled to injunctive relief—not an appropriate ruling at the motion to dismiss stage. Indeed, as shown below, *infra* 29-33, the Tribe's Complaint describes the significant environmental, cultural and religious harms sufficient to raise a claim for public nuisance. The allegations in the Complaint meet the pleading standard applicable at the motion to

dismiss stage. The Superior Court erred in dismissing the injunctive relief claims in the Complaint before properly resolving the factual disputes that remain as to the significance of the harm to the Hopi Tribe. To the extent the Court ultimately concludes that the equities do not support full permanent injunction of all snowmaking with reclaimed wastewater at Snowbowl, the Court may then issue alternative relief—for example, requiring additional treatment of the City's water before sending it to Snowbowl. *See* IR#105.

2. The Superior Court Wrongly Found that the Tribe Lacked Standing to Maintain Its Damages Claim

In concluding that the Tribe lacked standing to maintain its public nuisance claim, the Superior Court found that "the practical effect on the Hopi's ability to conduct ceremonies has not been substantially impacted, that the religious significance of The Peaks is not unique to the Hopi, and this claim is tied directly to the alleged environmental damage." APP.39 at 9. The Superior Court erroneously found that the Complaint did not contain enough detail to show a change in Hopi religious or cultural practice due to snowmaking, and, therefore did not meet the standing requirement for bringing a public nuisance claim. *See id.* at 8-9. The Superior Court neglects, however, the numerous specific, immediate, and irreparable ways that the Tribe and its members have been harmed by the release of reclaimed wastewater at the Peaks and erroneously applied requirements that are out-of-step with Arizona's notice pleading standard.

a. The Tribe's Complaint Properly Alleges the Tribe's Special Injury

The Tribe alleged specific uses of the immediate Snowbowl vicinity, including monthly pilgrimages for prayer and sometimes to collect water, greens, and herbs for Hopi ceremonies, APP.3 ¶¶ 115, 126, special visits to specific shrines and springs associated with particular annual ceremonies, *id.* ¶ 116, hunting for deer, elk, and small game, *id.* ¶ 117, and gathering plants, herbs tobacco, food, and other natural resources, *id.* ¶¶ 117, 127-29. The complaint alleged that there are "Hopi sacred areas, including shrines, in the immediate vicinity of the Snowbowl Resort Area." *Id.* ¶ 122; *see also id.* ¶¶ 124-25 (identifying two such shrines).

The Complaint makes clear that the use of reclaimed wastewater at Snowbowl has caused and will continue to cause significant harm to the Tribe and its members due to spiritual and environmental contamination of these important resources. For example, the laying of the pipeline to convey the reclaimed wastewater along Snowbowl Road has destroyed some of these areas and deprived Hopi of their use. *Id.* ¶ 130. Other areas used by Hopi practitioners near the Snowbowl resort also have been abandoned. *Id.* ¶ 138. The contamination of certain ceremonial objects and materials renders them incapable of use. *Id.* ¶¶ 131, 144. These impacts and harms to the Hopi Tribe are not "speculation," APP.39 at 8; they are concrete and irreversible injuries to

the Hopi Tribe and its members, *see infra* 32 (discussing statements by Hopi practitioners of the harm to them from the snowmaking at Snowbowl).

The Tribe's allegations clearly show that the Hopi Tribe "has a legitimate interest in an actual controversy involving its members" and that "economy and administration will be promoted" by allowing this case to proceed. *Armory Park*, 148 Ariz. at 6, 712 P.2d. at 919. The harms to the Hopi Tribe are "different in kind or quality from that suffered by the public in common." *Id.* at 5, 712 P.2d at 918. The Superior Court relied on the general public's right to enjoy an environment free from unreasonable contamination as grounds for rejecting the Tribe's standing in this case. APP.39 at 9. However, while spraying reclaimed wastewater on the Peaks may cause harm to a wide number of people, the public at large does not share the religious, cultural, and spiritual harms that the Hopi people have suffered. The general public also does not necessarily share the frequency and regularity of actual use of the area around the Snowbowl. For the public at large, wilderness areas and outdoor recreation may be fungible; if the Peaks become undesirable, members of the public may choose to use one of the other 32 state parks, https://azstateparks.com, up to 100 state premier trails, https://azstateparks.com/trails, the 25 national parks, trails, monuments, and historic sites, https://www.nps.gov/state/az/index.htm, or even other portions of the Coconino National Forest. For Hopi Tribe members, however, there is no substitute

for the Peaks area around Snowbowl that has been used since time immemorial for Hopi religious requirements.

Sample affidavits proffering testimony from members of the Hopi Tribe who have been personally impacted by the snowmaking at the Snowbowl are included at IR#198 at Exhibit 1, and provide further specificity and detail of the alleged interruption and thwarting of the enjoyment and use of the Peaks that is set out in the Complaint. The affidavits confirm that traditional Hopi practitioners have been forced to alter their pilgrimages, *see* IR#198, Exhibit 1, Affidavit of Sherold Nutumya ¶¶ 5, 7, Affidavit of Leigh Kuwanwisiwma ¶¶ 7-11, and cease gathering certain ceremonial objects from the area around the Snowbowl, *see* IR#198, Exhibit 1, Affidavit of Sherold Nutumya) ¶¶ 10-11, Affidavit of Clark Tenakhongva ¶¶ 6-8, Affidavit of Leigh Kuwanwisiwma ¶¶ 3-4, Affidavit of Floyd Lomakuyvaya ¶¶ 3-10, Affidavit of Ronald Wadsworth ¶ 8. These affidavits provide a small sample of the personal stories of the Hopi Tribe's members who have been forced to change their religious practices due to the presence Flagstaff's reclaimed wastewater at the Peaks. The impacts to the Tribe and its members is immediate and substantial, and not mere annoyance or inconvenience. The Superior Court was wrong to conclude that there is no set of facts that could be proven under the allegations in the Complaint to support the Tribe's showing of special injury to maintain its public nuisance claim.

Given the allegations in the Complaint of direct and significant harm that has caused the Hopi Tribe's members to change their religious observances, the Superior Court was wrong to conclude that there was "no set of facts" under the pleadings here where the Tribe could show special injury, and thus it was improper to dismiss the Tribe's complaint on standing. *Folk*, 27 Ariz. App. at 151, 551 P.2d at 600; *Coleman*, 230 Ariz. at 356 ¶ 8, 284 P.3d at 867. The Superior Court's ruling dismissing the monetary damages claim should be reversed.

b. The Ninth Circuit's Decision in *Exxon Valdez* Does Not Change Arizona's Standing Requirements

The Superior Court relied on the Ninth Circuit decision in *In re the Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997), to "define[] what does not qualify as a 'special injury' to satisfy the standing requirement in a public nuisance claim . . . ." APP.39 at 6. The Superior Court's reliance on that case, however, was misplaced.

The language used by the Ninth Circuit in *Exxon Valdez* does not match the special injury test set out by the Arizona Supreme Court and the Restatement of Torts. The claims in *Exxon Valdez* were evaluated under "maritime public nuisance" law, *see In re the Exxon Valdez*, No. A89-095-CV (HRH), 1994 WL 182856, at *1 (D. Alaska Mar. 23, 1994); *see also In re the Exxon Valdez*, 767 F. Supp. 1509, 1512-13 (D. Alaska 1991) (finding that general maritime law applied to the spill), *not* Arizona common law. The Ninth Circuit held that special injury could not be predicated on injury that is greater, but not fundamentally different, than that

suffered by the public at large. *In re the Exxon Valdez*, 104 F.3d at 1198. The Restatement, however, makes clear that the degree of harm must be considered in determining special injury for standing purposes: "Difference in degree of interference cannot, however, be entirely disregarded in determining whether there has been difference in kind," but rather, "in determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered." Restatement § 821C cmt. c.[2] The Arizona Supreme Court agrees:

> The rule, as stated by many, if not most, of the courts of the states, is that to authorize a private citizen to maintain an action to abate a public nuisance, he must show a special injury, different in kind, and not merely degree, from that suffered by the public generally, and much difficulty has been found in determining when the injury differs in kind rather than in degree from that suffered by the public. . . . Where to draw the line between cases where the injury is more general or more equally distributed and cases where it is not, where by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, ***it is often a mere matter of degree***, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is ground for special damage, and the more remote obstruction or interference which is not.

[2] Indeed, the Restatement comments recounting the earliest known case awarding damages to an individual plaintiff for a public nuisance stated that the action "could be maintained by a person who could show that he had suffered particular harm, *over and above* that caused to the public at large or to other members of the public exercising the same public right." Restatement § 821C cmt a (emphasis added).

Arizona Copper Co., 12 Ariz. at 201, 100 P. at 469 (emphasis added); *see also Armory Park*, 148 Ariz. at 5, 712 P.2d at 918 (special injury is shown whenever the "damage [is] different in kind *or quality* from that suffered by the public in common." (emphasis added)).

As shown above, the injury to the Hopi Tribe is different in degree and different in kind and quality than that suffered by the general public. The Tribe and its members have suffered specific and substantial loss of the resources previously available to them in the Snowbowl vicinity. The Hopi Tribe's standing in this case is not based on a generalized interest in the environment, but on particularized injuries to traditional cultural practices and discrete sacred sites and shrines. This Court should not rely on *Exxon Valdez* to modify the Arizona special injury test to preclude the Tribe from maintaining this cause of action.

Moreover, the *Exxon Valdez* case is singular in American jurisprudence and thus should be treated with caution. That case arose from the grounding of the Exxon Valdez in Prince William Sound in 1989 and included hundreds of individual lawsuits, many of which were eventually consolidated in the federal district court in *In re the Exxon Valdez*. *See In re Joint Briefing of Issues on Appeal from the Trans-Alaska Pipeline Liab. Fund*, 51 F.3d 280 at *1 (D. Alaska 1995) (describing the "veritable avalanche of lawsuits" and the procedural history of *Exxon Valdez* litigation). The district court in Alaska, charged with managing the case, described

it as "a difficult a complex case, with thousands of claimants, numerous complicated claims, case law and federal and state statutes which do not mesh well." *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1993 WL 649103, at *2 (D. Alaska Dec. 8, 1993).

Early in the litigation, the natural resources trustees entered into a consent decree with Exxon that covered all natural resource damages, including a minimum of $900 million (up to $1 billion) for damage to the environment and natural resources from the spill. *See Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994). The early consent decree played an important role in how the courts evaluated the private claims. For example, when a proposed class of sport fishermen filed a complaint "alleging 'injury suffered by the public at large because of violations of rights common to the general public,'" the district court held that they could not, "neither as individuals nor as a class, recover what the governments already recovered." *In re Exxon Valdez*, No. A89-095-CIV, 1993 WL 735037, at *2 (D. Alaska July 8, 1993), *aff'd sub nom. Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 774 (9th Cir. 1994) (finding that the governments "already recovered damages on behalf of the public for the public's loss of use and enjoyment of natural resources caused by the tragic *Exxon Valdez* oil spill in Prince William Sound."). As a result, the Ninth Circuit cautioned that the private party litigation that emerged

was not one "about befouling the environment," but rather "a case about commercial fishing." *In re the Exxon Valdez*, 270 F.3d 1215, 1221 (9th Cir. 2001).

In managing the claims, the district court certified five classes of plaintiffs, including a class of Native Alaskans, which alleged separate claims for "cultural damage" and "harvest damage." *In re the Exxon Valdez*, 104 F.3d at 1197. The court found that "native subsistence harvesters" were eligible for damages from Exxon under federal maritime law, *see In re the Exxon Valdez*, No. A89-095-CV (HRH), 1994 WL 16195323 at *3 (D. Alaska May 31, 1994),[3] and then separately evaluated whether the cultural damage could be compensated over and above the harvest damages and the $1 billion in natural resource damages already paid by Exxon to the natural resource trustees. The district court found that the Native Class did not have standing to recover additional damages for cultural damages from harm to the subsistence lifestyle, 1994 WL 182856 at *2-3, and the Ninth Circuit affirmed, 104 F.3d at 1198.

The Superior Court erroneously applied the *In re the Exxon Valdez* decision out of context and over-broadly applied its very case-specific holdings to the Hopi Tribe's public nuisance claims in Arizona. As shown above, the Hopi Tribe has

[3] A jury eventually awarded several Alaska Native corporations almost $6 million for harm caused by the spill, in addition to over $23 million awarded by the Trans-Atlantic Pipeline Liability Fund. *See Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 774-75 (Alaska 1999).

stated a claim for special injury based on "immediate obstruction [and] peculiar interference," *Arizona Copper*, 12 Ariz. at 201, 100 P. at 469, with its members' ability to continue to practice their religion that is "over and above," Restatement § 821C cmt. a, the harm to the general public. The Court should not use the *In re Exxon Valdez* decision to alter or narrow special injury standing under Arizona law.

3. The Superior Court Should Have Allowed Amendment of the Complaint

The Superior Court wrongly denied the Tribe's request to amend its initial Complaint based on its determination that amendment "would be futile." APP.50 at 2. The Court of Appeals reviews the Superior Court's futility determination *de novo*. *See Corinthian Colleges*, 655 F.3d at 995; *Aubuchon*, 2015 WL 2383820, at *3 ¶ 13. Requests to amend a Complaint should be "liberally" granted, with few exceptions, including undue delay in the request, bad faith, undue prejudice, or futility in the amendment. *MacCollum*, 185 Ariz. at 185, 913 P.2d at 1103. The Tribe's request was not "made in bad faith or to delay proceedings." *State Comp. Fund v. Yellow Cab Co. of Phoenix*, 197 Ariz. 120, 125 ¶ 25, 3 P.3d 1040, 1045 (Ct. App. 1999), but rather was intended to address the heightened pleading standard set forth by the Superior Court even though the Superior Court's pleading standard was erroneous.

The Superior Court's determination that amendment would be futile is legally incorrect because it is not clear that the Tribe's Complaint "could not be saved by *any* amendment." *Corinthian*, 655 F.3d at 995 (quotations omitted) (emphasis

added); *Levine*, 32 F. App'x at 278 (9th Cir. 2002) (denial of leave to amend complaint is only appropriate where the complaint "could not possibly be cured by the allegation of other facts."). *See also Lopez*, 203 F.3d at 1130 (leave should be granted where "it appears at all possible that the plaintiff can correct the defect").

Even if the heightened pleading standard set forth by the Superior Court was correct, amendment should have been allowed to permit the Tribe the opportunity to meet it. In *In re Cassidy's Estate*, 77 Ariz. 288, 298, 270 P.2d 1079, 1085 (Ariz. 1954), for example,e the Supreme Court of Arizona reversed the dismissal of a complaint without opportunity to amend. In that case, the plaintiff alleged fraud (which requires pleading with more particularity than a public nuisance claim), *id*. at 296, 270 P.2d at 1084, and the Court found that while the complaint was "defective for lack of particularity," the plaintiff was entitled to an opportunity to amend its complaint to fix this defect, *id*. at 298, 270 P.2d at 1085. *See also Haug v. Midstate Mech., Inc.*, No. CV-11-01584-PHX-JAT, 2012 WL 592747, at *3 (D. Ariz. Feb. 23, 2012) (permitting leave to amend where plaintiff asserts that a valid claim can be alleged with more specificity, and it is possible that plaintiff can allege facts and statutory violations that satisfy the pleading standard).

Similarly, the Superior Court wrongly denied the Tribe's request for leave to amend. The Superior Court based its decision to grant the Snowbowl's motion to dismiss on its perception that "there are no well pled facts that support a finding that

ceremonies have been interrupted or thwarted," APP.39 at 9, indicating that there may well be "facts that would render [the Tribe's] claim viable," and thus making the denial of leave to amend improper. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701-02 (9th Cir. 1988).

Indeed, the Tribe was and remains ready to further supplement and specify the allegations in the Complaint, and requested leave to do so. IR#150 at 12. *See also* IR#198, Exh. 1 (with examples of specific ways in which the use of reclaimed wastewater at Snowbowl has interrupted and thwarted the Tribe's ceremonies and religious activities). Therefore, the Superior Court should not have dismissed "out-of-hand" the perceived "defective pleading." *In re Cassidy's Estate*, 77 Ariz. at 296, 270 P.2d at 1084; *see also Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 589, 637 P.2d 1088, 1092 (Ct. App. 1981) (reversing dismissal of complaint with prejudice where plaintiff filed motion to amend or alter the judgment because amendment could cure the defects in the pleadings). The defect that the Superior Court perceived in the Complaint could have been corrected by amendment after the Superior Court enunciated the standard for the pleading, and so the Superior Court's decision to deny the Tribe leave to amend and to dismiss its public nuisance claim with prejudice was erroneous and must be reversed.

B. The Superior Court's Fee Awards to the City and Snowbowl Were Wrong

1. ARS § 12.341.01 Does Not Apply to the Public Nuisance Claim

The Superior Court erroneously found that ARS § 12-341.01 provides a basis to award the defendant and third-party defendant their attorneys' fees in this matter. ARS § 12-341.01(A) provides that "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." The Superior Court extrapolated that this provision may apply even without any contractual duties between the parties or any breach of an obligation arising from contract. APP.50 at 3 (relying on *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986)). The Superior Court erred in its overbroad application of ARS § 12-341.01.

The Arizona Supreme Court has provided guidance on how to determine whether a case arises from contract for purposes of ARS § 12-341.01. In *Barmat v. John and Jane Doe Partners A-D*, the Court held that plaintiffs' successful claim for legal malpractice did not arise out of contract. 155 Ariz. at 521-24, 747 P.2d at 1120-23. Rather, "the duties imposed on attorneys exist even in the absence of contract and may extend to all persons within the foreseeable range of harm." *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 14 ¶ 22, 6 P.3d 315, 319 (Ct. App. 2000) (describing the reasoning in *Barmat*). The example given by the Arizona Supreme Court in *Barmat* is instructive for this case:

> Consider, for example . . . the seller of a chattel that causes damage. If the chattel was defective and unreasonably dangerous . . . the injured buyer may maintain a tort action under the theory of strict liability. Here, too, although the relationship between buyer and seller arose out of a contract, the essential nature of the action sounds in tort: the liability would of the seller would exist even without the contract. Even a "mere bystander" having no contractual relationship could recover from the seller. The duty breached is one imposed by law.

Barmat, 155 Ariz. at 523 n.1, 747 P.2d at 1222. The Supreme Court's rationale in *Barmat* applies whenever the law "imposes a duty of care on a party regardless of the existence of a contract." *Ramsey Air Meds*, 198 Ariz. at 15 ¶ 23, 6 P.3d at 320. In this case, the Hopi Tribe is the "mere bystander" to the contract, with "no contractual relationship" to either party. It is clear that the duty not to create or maintain a public nuisance is "a duty of care" that exists "regardless of the existence of a contract." *Id.* Similarly, the Tribe's and the public's right to be free from unreasonable harm is not dependent on the presence (or absence) of any contract. The City's liability "would exist even in the absence of a contract," *id.* at 14 ¶ 22, 6 P.3d at 319, rendering ARS § 12-341.01 inapplicable.

While the reclaimed water contract between the City and Snowbowl gives rise to certain obligations and rights *between the City and Snowbowl*, it is not the source of the duty to refrain from "unreasonable interference with a right common to the public," *Armory Park*, 148 Ariz. at 4, 712 P.2d at 917, at issue in the Hopi Tribe's claims in this case, and so does not trigger ARS § 12-341.01. The City's obligation to not create the circumstances that cause a public nuisance is unrelated to the

contractual obligations to the Snowbowl. This is obvious from reviewing the Snowbowl's motion to dismiss, which exclusively discusses common law nuisance requirements and obligations. IR#109.

There are numerous cases that make clear that the reach of ARS § 12-341.01 does not extend to cases such as this, where there is no contract between the plaintiff and defendant, and the duty being alleged arises from common law tort, not an express or implied contract. In a closely analogous case, the Arizona Court of Appeals in *Robert E. Mann Construction Co.* overturned the Superior Court's award of attorneys' fees because the claim did not arise out of contract. 204 Ariz. at 133-34 ¶¶ 11-17, 60 P.3d at 712-13. In that case, the Kingman Regional Medical Center hired a general contractor to build a new MRI suite; the general contractor hired a subcontractor to install the heating/air conditioning components; the subcontractor installed an air conditioner that was sold and distributed by the defendants. *Id.* at 131 ¶ 2, 60 P.3d at 710. After settling a claim brought by the Medical Center, the general contractor, as the subcontractor's assignee, brought a claim against the air conditioning manufacturer and supplier. *Id.* at 131 ¶ 3, 60 P.3d at 710. Eventually, judgment was entered for defendants, and the Court awarded attorneys' fees in favor of defendants against the general contractor. *Id.* at 131 ¶ 4, 60 P.3d at 710.

The Court of Appeals found that the claim between the general contractor and the manufacturer and distributer of the air conditioning unit was not based in contract

for purposes of ARS § 12-341.01. The Court of Appeals specifically rejected defendants' argument that the purchase order contract between the subcontractor and the air conditioner supplier triggered ARS § 12-341.01. The Court reasoned that a "common products liability lawsuit does not arise out of contract." *Id.* at 134 ¶ 16, 60 P.3d at 713. Moreover, the Court found relevant the fact that "the contract was not even between [the general contractor] and [defendants] but between [the defendant] and [the subcontractor]," who had not been sued by the general contractor. "The legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship." *Id.* at 134 ¶ 16, 60 P.3d at 713.

Similarly, in *Kennedy*, a consumer sued an automotive dealer seeking relief under the Lemon Law. 175 Ariz. at 324, 856 P.2d at 1202. The Court of Appeals held that though the car was subject to a contractual lease agreement, "[t]he essential basis of the action was a statutory remedy designed to protect purchasers . . . ." *Id.* at 325, 856 P.2d at 1203. Thus, the Court found that ARS § 12-341.01 was inapplicable because the interpretation of the contract was not the focus of the claim and denied the request for attorneys' fees. *Id.* at 325-26, 856 P.2d at 1203-04. Likewise, the focus of the Tribe's claims here is on the remedies available under Arizona common law and not a contract.

Finally, in *Cashway Concrete & Materials*, this Court held that ARS § 12-341.01 may be inapplicable to an action even where a contract is present. 158 Ariz. at 83, 761 P.2d at 157. In that case, Cashway supplied concrete to a subcontractor of Sanner. *Id.* at 82, 761 P.2d 156. When the subcontractor failed to pay for the concrete, Cashway sued Sanner, seeking the statutory remedy of a materialman's lien. *Id.* The court found that although a breach of contract between Cashway and the subcontractor was a factual predicate to the action, it was not the essential basis of it. *Id.* at 83, 761 P.2d at 157. Rather, the court found that since the remedy for the claim "exists against those who are foreign to the contract. The action, therefore, does not arise out of the contract." *Id.*

These cases help to define the contours of the applicability of ARS § 12-341.01 and show that cases like the one at hand—where there is a contract in the background facts of the case, but does not create or alter any rights or duties between plaintiff and defendant—ARS § 12-341.01 simply does not apply. In the present case, the contract that the City and Snowbowl argue forms the basis for the application of ARS § 12-341.01 is the contract for sale of reclaimed wastewater between the City and Snowbowl. There is no contract between the Hopi Tribe and either other party. The Court in *Mann Construction* rejected essentially the same argument as that made by the City and Snowbowl: that by its "pleadings and stipulation, [plaintiff] made this an action 'arising from' the [purchase] contract,"

because it "expressly alleged that the claims for which it sought recovery . . . were those 'arising from the contract for the purchase of the product'" between the seller and subcontractor. 204 Ariz. at 134 ¶ 14, 60 P.3d at 713 (quoting defendants' argument). The Tribe's public nuisance claim, like a common products liability lawsuit does not depend on the existence of a contract, and does not "arise out of contract" because the public nuisance tort is not predicated on a "breach of, or fraudulent inducement of, the contract." *Id.* at 134 ¶¶ 15-16, 60 P.3d at 713. Rather, the Tribe's right to challenge an interference with a right common to the public is separate and distinct from the contracting parties' rights pursuant to the contract. The contract is "peripheral" to the primary issues involved in the public nuisance claim, and so ARS § 12-341.01 is inapplicable. *Keystone Floor& More LLC v. Arizona Registrar of Contractors*, 223 Ariz. 27, 30 ¶ 12, 219 P.3d 237, 240 (Ct. App. 2009).

The Superior Court also stated that an award of attorneys' fees under ARS § 12-341.01 is appropriate where a tort claim is "interwoven" with a contract claim. APP.50 at 4 (citing *ML Servicing Co., Inc. v. Coles*, 695 Ariz. 562, 570, 334 P.3d 745, 753 (2014)). This principle of Arizona law has evolved to cover situations where a plaintiff pleads multiple claims, some sounding in tort and some sounding in contract, that are so interwoven that it would be impossible or very difficult to determine which fees were incurred on the contract claim and which fees were

incurred on the tort claim. *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (Ct. App. 1983) (holding that recovery of attorneys' fees where tort claims were inextricably intertwined with contract claims is appropriate because "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Such is not the case here. Even if the nuisance claim was "interwoven" with a contract claim prior to the first appeal and remand, that cannot be true post-remand. The public nuisance claim stands alone as the sole post-remand claim. It is not "interwoven" with anything. This is recognized in the Court of Appeals' prior decision reversing and remanding award of attorneys' fees on the public nuisance claim even while preserving the contract claim fees award. *See* IR#55 at 26 ¶ 46 (holding that the City was the successful party on the illegal contract claim but not the public nuisance claim and remanding to the Superior Court for further proceedings to determine the proper fee amount).

2. The Hopi Tribe Should Not Be Assessed the Fees Incurred by the Snowbowl

Even if the Court determines that ARS § 12-341.01 is applicable to this matter, the Court should reverse the Superior Court's decision to assess the Snowbowl's attorneys' fees against the Tribe. While the trial court has some discretion to determine the amount of the fee award, *Rowland,* 199 Ariz. at 587 ¶¶ 30-31, 20 P.3d

at 1168, the court abuses this discretion where the reasons given by the court are "clearly untenable, legally incorrect, or amount to a denial of justice." *Reiss*, 223 Ariz. at 518 ¶ 40, 224 P.3d at 1015. The Superior Court's award of fees to Snowbowl was an abuse of discretion because forcing the Tribe to pay for work done in defense of the third-party claim and awarding duplicative fees to Snowbowl on top of the City's fee award amounts to a denial of justice.

The fees requested by Snowbowl include significant work completed solely to defend the third-party claim filed against it. A review of the invoices shows that the fees for work on Snowbowl's motion to dismiss the Tribe's complaint amounted to $58,294.18. This is the maximum limit of the Snowbowl's attorneys' fees award that should be assessed against the Hopi Tribe. Costs incurred to litigate the third-party claim filed by the City should be left to the City and Snowbowl, who have already agreed to a cost-sharing indemnification. *See* IR#79 (Third-Party Complaint) ¶¶ 8, 65, 78, 79; IR#79, Exhibit B; IR#198 at 4.[4] In its papers below, the Tribe provided this detail to the Superior Court. *See* IR#198 at 10. The Superior Court, however, did not evaluate the time spent by Snowbowl to defend the City's third-party claim, resulting in an abuse of discretion in forcing the Hopi Tribe to

[4] The Tribe filed a proposed amended complaint on June 7, 2016, the deadline for amendments to the pleadings, well after the City had already brought Snowbowl into the action and at the close of briefing on the motion to dismiss. That Superior Court never ruled on that motion.

subsidize attorneys' fees incurred on an entirely separate matter that exists solely between the City and Snowbowl.

Assessing both the City's and Snowbowl's fees against the Tribe requires the Tribe to pay for duplicative efforts. For example, if the judgment below is allowed to stand, the Tribe will pay for two separate rounds of briefing on two similar motions to dismiss—one filed by the City and one filed by the Snowbowl after it was brought into the litigation. Such duplicative fees are not reasonable. *See Ladewig v. Arizona Dep't of Revenue*, 204 Ariz. 352, 353, 63 P.3d 1089, 1090 (Ariz. Tax Ct. 2003) (reducing hours of Class Counsel's time as one of the bases upon which attorneys' fees will be calculated to account for duplicative efforts); *Wininger v. SI Mgmt. L.P.*, 244 F. App'x 156, 158 (9th Cir. 2007) (court properly avoided awarding duplicative fees and fees for hours spent on any work other than providing the benefits of the litigation); *Angel Jet Servs., LLC v. Giant Eagle, Inc.*, No. CV-09-01489-PHX-SRB, 2013 WL 11311729, at *9 (D. Ariz. Apr. 17, 2013), *aff'd*, 617 F. App'x 731 (9th Cir. 2015) ("the Court finds it appropriate to reduce the total request for attorneys' fees to account for this redundant and duplicative billing"). Awarding fees when they reflect duplicative efforts amounts to a denial of justice. Therefore, the Superior Court's award that failed to consider the reasonableness of requiring the Tribe to pay the attorneys' fees of a party it did not bring into the action

and who filed a second motion to dismiss after the first was overturned on appeal is an abuse of discretion and should be reversed.

3. The Fee Award Was Unreasonable Because It Was Based on Unreliable Filings that Were Riddled with Errors

Even if the Court determines that attorneys' fees are appropriately awarded in this matter, the Tribe requests that the Court remand the case to the Superior Court for further proceedings on the reasonable amount of such fees. The reasonableness of the fees was not properly evaluated by the Superior Court. The invoices filed in support of Snowbowl's request for attorneys' fees contain improper block-billing, extensive redactions, and errors, all of which make impossible the assessment of whether the fee request is "reasonable."

This Court disapproves of "block-billing" techniques and has appropriately reduced fee requests accordingly because "time spent on each task cannot be reviewed for its reasonableness." *In re Guardianship of Sleeth*, 226 Ariz. 171, 178 ¶ 34, 244 P.3d 1169, 1176 (Ct. App. 2010). Such billing practices can drastically overstate time spent on a matter. *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (discounting block-billed hours in light of State Bar Committee report that block-billing may overstate time spent by 10 to 30 percent and tends to conceal actual time spent on particular tasks). Despite the clear rules disfavoring block-billing practices, Snowbowl's fee request contained invoices with extensive block billing. *See* IR#151 at Exhibit 1.

In addition, the invoices filed in support of Snowbowl's fee request contained improper redactions that make it impossible to determine the subject matter of many of the entries. "When a party redacts significant portions of the narrative in a billing entry, the trial court is hardly able to assess the propriety of the task and evaluate the reasonableness of the time spent on it." *Salero Ranch, LLC v. Union Pac. R. Co.*, No. 2 CA-CV-2012-0165, 2013 WL 4609440, at *4 ¶ 19 (Ct. App. Aug. 28, 2013). This Court has previously concluded that "it was an abuse of discretion for the court to include such entries in a final fee award" where a significant portion of the description was redacted, and reduced the fee award by those entries. *Id.* at *5 ¶ 21. Snowbowl's billing entries contain numerous instances of such improper redactions. *See, e.g.*, IR#151, Exh. 1 at 1 ("Call to client regarding [redacted]"), 7 ("Correspondence with client regarding [redacted]"), 29 ("Review/analyze whether [redacted]"), 30 ("Conduct legal research re: [redacted]"). Because the subject and nature of these entries is obscured by Snowbowl's improper redactions, Snowbowl did not "provide sufficient detail to enable the court to assess the reasonableness of the fees." *Salero Ranch*, 2013 WL 4609440, at *4 ¶ 19.

Finally, Snowbowl's filings concerning its fee request were riddled with errors, including requests for differing amounts in the motion and in the supporting declaration. *Compare* IR#151 [Johnson Declaration] at Exhibit A, ¶ 6 (referencing fees in the amount of $320,628.34) *and* IR#151 [motion] at 2 (referencing

$348,745.84 in fees incurred) *with* IR#151 [motion] at 12 (requesting an award of $303,349.44). The proposed judgment submitted by Snowbowl and signed by the Superior Court judge ultimately awarded $302,169.45 in fees and $172.00 in taxable costs—yet another figure that was not included in any of the filings in support of Snowbowl's motion. APP.57 ¶ 4. The way Snowbowl has presented its fee request makes it impossible to know which entries in the invoices are charged to the ultimate request and which are not, and therefore impossible to assess the reasonableness of the award.

The Tribe brought these deficiencies to the Superior Court's attention, IR#198 at 8, but the Superior Court apparently disregarded this shortcoming, making only a one-line conclusion of law that the fees presented by Snowbowl "were necessary and reasonable to the defense of the action." APP.50 at 5. This summary grant of the entirety of the amount requested by the Snowbowl is an abuse of discretion, and the Court should remand for further proceedings on the proper amount of fees assessed against the Tribe.

IV. Conclusion

The Hopi Tribe respectfully requests that the Court reverse the Superior Court's dismissal of the Complaint under Rule 12(b)(6) and remand for further proceedings. Alternatively, the Tribe requests that the Court reverse the Superior Court's award of attorneys' fees.

As set out herein, the Tribe has adequately pled sufficient facts to support its public nuisance claim. It has shown that the damage caused by releasing millions of gallons of reclaimed wastewater onto the San Francisco Peaks will result in substantial, permanent, and unreasonable harm to the Tribe, its members, and the public who uses and enjoys the Peaks and the natural resources they provide. The Tribe is particularly well suited to maintain this action because of the singular nature of the Peaks in Hopi religion, culture, and life. The Tribe and its members have been substantially harmed by the snowmaking at Snowbowl, and suffered special injury separate and above that incurred by the public. As such, it has standing to maintain its claim. Moreover, because the Tribe has alleged facts sufficient to support its claim for public nuisance, the Superior Court was wrong to dismiss the Tribe's request for injunctive relief. Injunctive relief is to be crafted by the Superior Court after determining whether a public nuisance exists, and should be tailored to address the harm caused by the nuisance. It would be premature to determine what relief is appropriate at this stage, before the facts are known or the particular equities of the case can be ascertained.

The Tribe also urges the Court to set aside the Superior Court's award of attorneys' fees to the City and Snowbowl. ARS § 12-341.01 is not meant to address cases like this, where the only claim is based in tort, and does not arise out of the presence or absence of a contract. Indeed, the only contract here—a purchase and

sale agreement between the City and Snowbowl—does not impact the Tribe's right to be free from a public nuisance. Nor does it create the City's and Snowbowl's obligation to refrain from causing a nuisance. As such, the Tribe is a "mere bystander" to the contract, and ARS § 12-341.01 does not apply.

Finally, even if the Court determines that ARS 12-341.01 is applicable here, the Tribe maintains that the materials submitted by the City and Snowbowl in support of the attorneys' fees requests were unreliable to the point where they cannot form the basis of a reasonable award. As shown above, the application was riddled with errors and mistakes. Yet the Superior Court awarded the full amounts requested by the City and Snowbowl without addressing the reliability of the amount requested.

Respectfully submitted this 6th day of April 2017,

s/Anne E. Lynch

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