Clerk of the Superior Court
*** Electronically Filed ***
01/30/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000505-001 DT 01/28/2019

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

RONALD A SIMMS

BENNETT EVAN COOPER

v.

JEREMY E SIMMS (001)
TP RACING L L L P (001)
BELL RACING L L C (001)
ARIZONA RACING COMMISSION (001)
ARIZONA DEPARTMENT OF GAMING (001)

JAMES M TORRE
CAMILA ALARCON
JOSEPH KANEFIELD

STACY W. HARRISON
PAUL K CHARLTON
NATHAN J. NOVAK
MICHAEL C MANNING
CHRISTOPHER L HERING
MICHAEL MYERS
JUDGE THOMASON

RULING

The Court has considered the Motion for Attorneys' Fees and Other Expenses ("fee motion") submitted by Ronald Simms ("Ron"), the Responses of the Arizona Racing Commission ("ARC" or the "Commission"), the Arizona Department of Gaming ("DOG" or the "Department") and TP Racing L.L.L.P., Jeremy Simms and Bell Racing LLC (the "Jerry Parties" or "Jerry") and the Replies to each of those Responses. The Court has also considered the arguments of counsel for Ron, DOG and ARC. The Court finds and rules as follows:

PROCEDURAL BACKGROUND

A. The Administrative Proceedings

Ron's appeal to this Court involved a dispute about Ron's racing license. The dispute began on December 6, 2013, when the Department's former Director denied Ron's application for an

owner's license (the "2013 License Denial"). The denial was based on, inter alia, findings that Ron was not of good repute and moral character to receive an owner's license, as required by A.R.S. § 5-108(A)(1)(b), and that he had made intentional misrepresentations to the Department related to the Bruin Corporation ("Bruin"). Ron requested an administrative hearing on the 2013 License Denial before an administrative law judge ("ALJ") at the Arizona Office of Administrative Hearings ("OAH"), referred to as the "OAH Appeal."

B. The OAH Appeal

The ALJ held hearings on Ron's appeal between September 8, 2014 and April 22, 2015. On June 17, 2015 the ALJ issued a decision (the "OAH Decision"). The ALJ reversed the Department's 2013 License Denial. OAH Decision at 23:8-11 ("After full review, this Tribunal concludes that the preponderance of the evidence presented at the hearing established that Mr. Simms is qualified to be licensed by [the Department] and that he has sufficient good repute and moral character to satisfy the statutory requirement for a license.").

On July 24, 2015, the Department certified the OAH Decision as the final administrative decision pursuant to A.R.S. § 41-1092.08(D). See July 24, 2015 Certification of Decision and July 28, 2015 Order Amending Certification (the "Certification"). In other words, the Department effectively accepted the OAH Decision. None of the subsequent proceedings were the result of action taken by the Department. Ron did not file an application for payment of his attorneys' fees from the Department, or anyone else for that matter, within thirty days of the Certification of the OAH Decision.

On July 28, 2015, Jerry filed an objection to the Certification. The basis for the objection was that the Certification of the OAH Decision could not be the "final administrative decision," because the ARC had the authority to review the OAH Decision. See July 28, 2015 Objection to Certification of the OAH Decision. Though counsel for the Director offered his opinion that the ARC did not have the authority to consider the appeal, the Department did not take an official position on whether the Jerry Parties had standing to prosecute an appeal. See Ron's July 21, 2015 Statement Regarding "Objection to Certification of Decision of Administrative Law Judge." On August 21, 2015, the Jerry Parties filed a Notice of Appeal of the OAH Decision to the Commission, which the Commission accepted and placed on its agenda. See September 1, 2015 Letter Notifying of Placement of Notice of Appeal on Commission Agenda.

C. The Commission Proceedings

The Department asserted its status as a nominal party in the appeal to the Commission (the "Commission Proceedings"). In response to the Jerry Parties' Notice of Appeal and Ron's Motion to Dismiss the appeal, the Department filed a submission in which it stated it took no position on

either of those filings. See September 8, 2015 Consolidated Response to Notice of Appeal and Motion to Dismiss. Shortly thereafter, and still early in the Commission Proceedings, Ron's counsel stated on the record that Ron had declined to seek attorneys' fees for "several million dollars" from the Department after the OAH Appeal, even though Ron had the right to recover fees. See October 8, 2015 Arizona Racing Commission Transcript.

During the entirety of the Commission Proceedings between September 10, 2015 and October 21, 2016, only Ron and the Jerry Parties participated, with each side filing numerous motions and other filings. The Department did not take any active role in these proceedings, as it had already certified the OAH Decision as the final administrative decision. The Commission served as an adjudicative body during the Commission Proceedings.

On October 28, 2016, the Commission reversed the OAH Decision (the "Commission Decision"). In its decision, the Commission modified certain findings of fact and conclusions of law made by the ALJ and denied Ron's 2013 license application. Based on the modified Findings of Fact, the Commission concluded, inter alia, that Ron made a knowingly false statement of material fact to the Department and that the preponderance of the evidence established that he did not have sufficient good repute and moral character to obtain a racing license. Commission Decision at Conclusions of Law 6-8, ¶¶ 4, 11. In sum, the Commission reversed the OAH Decision and denied a license to Ron. Id. at 8:4-8. Ron appealed the Commission Decision to the Arizona Superior Court, Case No. LC2016-000505-001 DT, commencing the appeal in front of this Court (the "Judicial Review Proceedings"). See December 8, 2016 Notice of Appeal.

D. The Judicial Review Proceedings

At the beginning of the Judicial Review Proceedings, the Department re-asserted its stance that it was taking no position and that it was only a nominal party to the ongoing proceedings. See January 3, 2017 Response to Ron's' Motion to Bifurcate for Resolution [Two] Issues on Appeal ("During the appeal before the Commission, the Department took no position and was therefore a nominal party. The Department now asserts its status as a nominal party to these proceedings and will therefore abstain from actively participating as an advocate."). Indeed, the Department took no position on the appeal during the entirety of the Judicial Review Proceedings, through this Court's June 18, 2018 Minute Entry Ruling (the "Judicial Review Ruling"). In the Judicial Review Ruling, the Court reversed the Commission's decision based on the Court's finding that the Jerry Parties lacked standing to prosecute the appeal to the Commission.

E. Ron's Fee Motion.

Ron's Fee Motion asks that this Court award over $10,000,000 in attorneys' fees and almost $800,000 in expenses against both the Commission and the Department. The Motion

contains almost no applicable legal analysis. For example, there is virtually no statutory analysis identifying the applicable "contested case proceeding" in the underlying administrative proceedings under A.R.S. §12-348. There is also no discussion of the legal import of the Commission's role as an adjudicative body and the Department's status as a nominal party after the OAH Decision. Rather, Ron spends the bulk of his Motion discussing "highly unethical and pervasive collusion" that allegedly occurred in the underlying administrative proceedings. This discussion was of little help to the Court in assessing the legal issues necessary for resolution on this Fee Motion.

With little analysis or support, Ron asks the Court to award all of the requested fees against both the Commission and the Department, jointly and severally, "for all administrative proceedings dating back as far as the issuance of the Notice of Denial." In reality, there is no legal basis for this request. In addition, the amount of fees and expenses requested are patently unreasonable. By way of example, Ron provides absolutely no justification his request for well over $4,000,000 in fees spent in the Judicial Review Proceedings alone.

THE ARIZONA DEPARTMENT OF GAMING

The Court finds that the Department became a nominal party on July 24, 2015. The Department took no position thereafter. The Court declines to award fees against the Department while it was a nominal party. A.R.S. 12-348(H)(4); *Mission Hardwood Co. v. Registrar of Contractors*, 149 Ariz. 12, 16 (App. 1986) (the *Cortaro Water Users'* decision stands for the proposition that "attorneys' fees should not be assessed against a state agency which adopts a nominal role in the appeal and review of its decision. However, the court held that if the agency adopts the role of an advocate, it ceases to be a nominal party…").

The Department certified the OAH Decision as final and thereafter took no active role. The "appeal" to the Commission was initiated by the Jerry Parties and the appeal to this Court was initiated by Ron. The Department never adopted the role as an advocate at the Commission or during the Judicial Review Proceedings. It would be manifestly unjust to assess fees against the Department while it was a nominal party.

Ron argues that some exception to this rule applies here. For example, Ron contends that this rule should not apply because the Department had some pecuniary interest in the outcome, citing *Bromley Grp., Ltd. v. Ariz. Dep't of Revenue*, 170 Ariz. 532, 539 (App. 1991). There is nothing before the Court, however, that would even suggest that the Department had a pecuniary interest in the outcome. The fact that the Department issues gaming licenses hardly establishes that it had a pecuniary interest in the outcome of this dispute. And while the outcome might have some intangible impact on the Department, the *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 332 (App. 1993) decision does not stand for the proposition that any residual impact on an agency subjects it

to fees, even when taking a nominal role. Indeed, the results of an appeal of an administrative action will usually have some impact on an agency. Common sense suggests that some residual impact on an agency resulting from an appeal of an administrative action should not subject the agency to fees when the agency takes a nominal role in an appeal.

There is simply no justification for awarding fees against the Department for any fees incurred after the OAH Decision. None of the fees thereafter incurred were incurred because of anything that the Department did or did not do. Rather, they were incurred only because the Jerry Parties appealed to the Commission. Ron never provides any sensible explanation as to why fees should be assessed against the Department after it assumed a nominal role in the case.

In addition, fees are not awarded against the Department for time spent during any of the administrative proceedings, prior to the Commission Proceedings. At the October 8, 2015 Commission meeting, Ron's counsel, in urging dismissal of the Commission Proceeding, clearly stated that Ron had waived the right to seek fees from the Department. Indeed, a timely fee application was not presented under A.R.S. § 41-1007(A). Under that statute, Ron was required to file a fee application with the ALJ within thirty days after the final decision or order. He did not do so.

Ron now asks the Court to ignore counsel's comments and award him fees for the OAH Appeal. Ron's counsel, however, made it perfectly clear that Ron had intentionally decided not to request fees for the OAH Appeal. Ron's attempt to now go "backwards" and recoup fees that he previously decided not to pursue would be manifestly unfair.

Ron in no way "conditioned" his alleged "statesmanlike" behavior on the matter being fully resolved, as he now claims. Indeed, the time to pursue fees under 41-1007 had come and gone. Ron's decision to not ask for fees under that statute was not conditioned on anything. Rather, he simply did not ask for fees under the statute. Once the applicable thirty day time frame came and went, he could not go back and assert a fee claim.

In arguing that the Commission Proceeding should be dismissed, Ron made it absolutely clear that he intentionally opted not to pursue fees for the OAH Appeal. Indeed, Ron's counsel stated "(w)e made it clear that Ron Simms was not going to further encumber this agency or the State of Arizona with additional legal fees, or even ask for them." Ron must have decided that there was some strategic advantage to letting the Commission know that Ron was not seeking fees against the "State." It would be fundamentally unfair to allow Ron to make an argument where he made it clear that he waived his fee claim and then allow him to later recoup his fees when that argument proved to be unsuccessful.

In *Eastern Vanguard*, the Court of Appeals held that §41-1007 did not supersede A.R.S. §12-348(I)(1) and preclude a fee award for contested case administrative proceedings under §12-348. *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 415 (App. 2003). As explained below, however, 12-348 does not provide a basis for a fee award for the OAH Appeal. Moreover, *Eastern Vanguard* did not deal with a situation where the litigant unequivocally told the agency he was not pursuing fees for administrative proceedings and therefore waived a fee claim.

ARIZONA RACING COMMISSION

The Arizona Racing Commission first argues that Ron does not qualify for fees and other expenses incurred at the administrative level. The ostensible legal basis for Ron's fee request is A.R.S. § 12-348(A)(2), which provides that "a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in …..(a) court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title or any other statue authorizing judicial review of agency decisions." Subsection (I)(1) of that statute provides that "fees and other expenses" in an action brought under subsection (A)(2) also includes "fees and other expenses that are incurred in the contested case proceedings in which the decision was rendered." As such, in order to be recoverable, the fees incurred in the state agency proceedings must have been incurred in "contested case proceedings" in which the decision being appealed was rendered. The decision being appealed was the Commission Decision, which, of course, was rendered in the Commission Proceedings.

Under A.R.S. § 41-1001(5), "contested case" means "any proceeding….in which the legal rights, duties or privileges of a party are required or permitted by law, other than this chapter, to be determined by an agency after an opportunity for an administrative hearing." Pursuant to A.R.S. § 41-1092, an "appealable agency action" means "an action that determines the legal rights, duties or privileges of a party and that is not a contested case." Here, the Director issued the Notice of Denial without a hearing. There was no right to a hearing. Ron then appealed. As such, this case began as an appealable agency action, not a contested case.

In 1985, the Court of Appeals decision in *Cortaro Water Users'* matter held that, in order to recover fees under A.R.S. § 12-348, one had to prevail in a "contested case" before the agency. *Cortaro Water Users' Ass'n v Steiner*, 148 Ariz. 343, 354 (App. 1985), *affirmed in part and reversed in part*, 148 Ariz. 314 (1986). Ron contends, however, that there has subsequently been a "sea change" in the law. According to Ron, the predecessor to A.R.S. § 41-1007 was passed after the *Cortaro* decision. That statute provides for recovery of fees in a "contested case or an appealable agency action." As such, fees can be awarded in contested cases or in appealable agency actions under §41-1007.

Fees can be only be awarded under 41-1007, however, by a hearing officer or administrative law judge, after timely application. No such award was made here. In fact, no such application was submitted. As such, statutory amendments to the statute that is now §41-1007 are irrelevant.

Ron's contention that "contested case proceedings" in §12-348 now includes both contested cases and appealable agency actions because of an amendment to another statute is nonsensical. Indeed, if that is what the legislature intended to accomplish, then 12-348 would have had to have been amended. The fact that 41-1007 expressly applies to both contested cases and appealable agency decisions actually makes it very clear that 12-348 plainly applies only to contested case proceedings.

The original 2013 License Denial was clearly not a contested case. There was no opportunity for a hearing. As such, the original denial was an appealable agency decision. The Court highly questions whether the appeal of an appealable agency action can "become" a "contested case." Indeed, such an appeal does not involve a determination "by an agency." A.R.S. §41-1001(5). Ron certainly provides this Court with no legal authority or analysis demonstrating that the appeal of an appealable agency action can "become" a "contested case." In any event, the OAH Appeal did not result in a decision that was reviewed by this Court and therefore does not fall within section (I)(1) of §12-348. Rather, the decision that was reviewed by this Court was rendered by the Commission.

As noted above, the Court questions whether an appeal of an appealable agency action can become a contested case. It is even more questionable if an appeal of an appeal of an appealable agency action can become a contested case. Nonetheless, the Commission Proceedings theoretically could have constituted a "contested case." Although the procedural rules of the "appeal" to the Commission are a little murky, the Commission certainly adjudicated Ron's legal rights after an opportunity for a hearing. Accordingly, in this review of an agency decision, fees could possibly be awarded for the time spent in the Commission Proceedings, which was where the decision being reviewed was rendered. A.R.S §12-348(I)(1). However, as explained below, the Court declines to award fees against the Commission for fees incurred in the Commission Proceedings due to the fact that it was the adjudicatory body. In addition, as noted above, the Department was a nominal party. Accordingly, no fees are awarded for the Commission Proceedings.

The Commission, from the time the Jerry Parties filed a notice appealing the OAH Decision to the Commission, until it issued its order denying Ron a license on November 1, 2016, was an adjudicator and not an advocate. Accordingly, fees cannot be awarded against the Commission for that time frame.

The Supreme Court ruling in *Cortaro Water* expressly held that fees should not be awarded against an administrative agency when acting in its "quasi-judicial capacity." *Cortaro Water Users' Ass'n v. Steiner*, 148 Ariz. 314, 318 (1986). As the Court noted, "(a) trial judge is not assessed attorneys' fees if a decision of his is overturned on appeal and we think the same basic principle should apply to decisions of hearing officers in the present context." 148 Ariz. at 318. Here, the Commission acted in a quasi-judicial capacity at the Commission Proceedings.

During argument, Ron argued that this rule of law should not apply because the Commission was also acting in a "regulatory" capacity. The Commission certainly has a "regulatory" role, but most agencies have "dual roles," as pointed out by *Cortaro Farms*. As the Supreme Court noted, "(a)gencies are placed in a difficult position by the very nature of the structure of administrative tribunals charged with the advancement of a particular public policy and enforcement thereof." *Id.* at 318. As such, despite the "dual roles" of administrative agencies, fees should not be assessed against agencies when acting in judicial or quasi-judicial roles.

While Ron contends that the Commission was not an unbiased adjudicator, the fact of the matter is that the Commission was the adjudicative body in which the OAH Decision was reviewed and adjudicated. It would clearly be improper to assess fees against an agency serving in a judicial or quasi-judicial capacity.

Obviously, decisions by administrative agencies should be rendered on the merits. Adjudicative bodies should not be forced to consider whether a certain outcome might ultimately lead to a fee award against the tribunal. Indeed, Ron argues that the Commission should have ruled that Jerry had no standing. Awarding fees against an adjudicative body based on the body not making the "right" decision would be unprecedented and unwise. Ron's request that fees be assessed against the Commission for fees incurred during the Commission Proceedings is denied.

The Court also finds, however, that it is appropriate to award fees against the Commission for its role on the appeal in this Court. The Commission played an active role in this appeal. It filed briefs and participated fully. Accordingly, some fees should be assessed against the Commission for time spent on this appeal. *See Mission Hardwood Co., Inc. v. Registrar of Contractors*, 149 Ariz. 12, 17 (App. 1986). ("In view of the Registrar's active role in the proceeding, we hold that the superior court properly awarded attorneys' fees against the Registrar.")

As the Supreme Court stated in *Cortaro,* "(t)he nominal party exclusion can logically attach to review at the superior court level as long as the agency simply certifies the record and answers the complaint. However, if the agency takes the role of an advocate it ceases to be a nominal party and may lose its statutory protection." 148 Ariz. 314, 318-19. The Commission could have simply "certified" its decision and decided to take no role in this Court. It did not do so. Therefore, it is subject to a fee award.

Finally, the Commission contends that, in the event that some fees are awarded, they should be limited to the amount incurred in asserting the successful standing argument. *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n,* 206 Ariz. 399 para 62 (App. 2003). *Eastern Vanguard*, however, only stated that one may not "recover the fees and expenses incurred solely in connection with unsuccessful claims." *Id*. Here, although Ron had several legal theories, he only had one claim—to vacate the Commission Decision. Ron ultimately prevailed on that claim. It is true that Ron only "won" on the issue of the standing of the Jerry Parties. But that does not mean that Ron should recover fees only on the "issue" on which he prevailed. The fact of the matter is that he did in fact win on his "claim." Moreover, while the Court did rule "against" Ron on two issues, other issues were left unresolved in light of the standing ruling. As such, it is unknown whether Ron would have prevailed on other issues, such as jurisdiction and the merits issue.

The Court does not believe that it is constrained to award fees incurred only on the standing issue. However, the Court has the discretion to determine a reasonable fee. The amount to be awarded will be discussed further below. In assessing the amount of fees to be awarded, the Court will consider the time reasonably spent on all of the various issues raised by Ron. The Court also take into account, however, that Ron "only" won on the standing issue.

Accordingly, the Court will award some fees incurred on this appeal in this Court against the Commission. No other fees will be assessed against the Commission.

THE RESPONSE OF THE JERRY PARTIES

The Response of the Jerry Parties is primarily a further heated discussion of Jerry's disagreements with Ron. For example, Jerry starts out disputing Ron's contention that there was extensive corruption leading up to the Notice of Denial. Jerry points out that the Court ruled against Ron on his due process claim challenging the actions of the Department Director Walsh before the Notice of Denial was issued. Jerry also contends that the Commission's findings against Ron were well supported.

There was no need at all for the Jerry Parties to file a Response. The Fee Application is not even directed to Jerry. Jerry's purported reason for filing a Response, that the July 24, 2018 Order might somehow be altered or supplemented, is not well taken. Jerry seemed to be searching for some reason to file a Response.

Despite the fact that the Response was unnecessary, Ron felt compelled to file a Reply. It is hard to imagine the purpose of Ron and Jerry spending additional significant fees "fighting" with each other on a Motion filed by Ron against parties other than the Jerry Parties. It seems that both of these parties simply cannot resist the opportunity to take a "shot" at the other. Ron and

Jerry's briefing directed at each other was singularly unhelpful to the Court in addressing the salient issues that had to be decided on the Fee Motion. [1]

THE APPLICABLE HOURLY RATE AND REASONABLE FEE

A.R.S. § 12-348(E)(2) provides that the hourly rate for attorneys' fees is capped at "a maximum amount of seventy-five dollars per hour, unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee." There certainly has been a cost of living increase since the statute was passed in 1981. According to information submitted by Ron, the increase in the consumer price index from 1981 would increase that $75 rate to approximately $220 dollars an hour.

The legislature clearly intended for awardable fees to be at fairly low rates. The Court can, however, consider "the limited availability of qualified attorneys" for the proceeding involved. It is certainly true that there are not qualified lawyers who could handle this case presently for $75.00 per hour. At the same time, it is very likely that there are qualified lawyers who would have competently handled this case at the inflation adjusted mark of $220 per hour. While this case certainly involved fairly complicated legal and factual issues, it was no more complex than fairly common commercial litigation cases frequently seen in this Court. The legal issues in this case, while challenging, were not overly difficult or complex. They were certainly not nearly as complex as issues one might run across in complicated patent or antitrust cases, or even other types of complex commercial litigation. Most experienced commercial litigation attorneys could have competently handled the issues presented here.

Ron's request for reimbursement of over $10,000,000 at extremely high rates is patently unreasonable, particularly under a statute that clearly is intended to have rates awarded at fairly low rates. Ron is not seeking fees at low rates. On the contrary. Ronald Simms is asking the Court to award over $9.5M for fees incurred by the Orrick firm in Los Angeles alone at hourly rates up to $1,000 an hour. In order to award fees at the astronomical hourly rates being requested, the Court would, at a minimum, have to find that there simply are no lawyers that could possibly do this type of work in a competent fashion at lower rates. That is an absurd proposition and the Court rejects it out of hand. While the lawyers at Orrick are certainly fine lawyers, and Ron can hire and pay whoever he wants to, there is no justification in the statute or common sense for the requests by Ron for reimbursement at very high hourly rates.

[1] As the Court noted at oral argument, it was simply not helpful to hear argument from the Jerry Parties. The Court also notes that Ron's argument about the alleged unfairness of some of the administrative proceedings and the Court's need to protect hypothetical future aggrieved parties who are not as wealthy as Ron was also not helpful to the Court in addressing the salient issues. The fact that this argument by Ron was unpersuasive was one of the reasons that the Court chose not to waste Court time hearing from the Jerry Parties.

The Court is constrained by the statute to award a reasonable amount at modest rates. The rates requested here are hardly modest. In light of the legislature's directive to award fees at lower rates, the request that hourly rates between $500 and $1,000 be awarded is rejected.

One of the many particularly problematic things about the fee application is the request for travel expenses and time billed during travel. There is absolutely no justification for awarding "travel expenses" to an out of state firm to fly back and forth from Los Angeles to litigate in Phoenix. Indeed, Ron had two excellent firms, GT and Squire Sanders, with Phoenix offices, already on the payroll, along with another fine Phoenix lawyer, Kip Micuda. Out of state travel expenses were hardly necessary, as excellent law firms in Phoenix could have done all of the work and not had ridiculously high travel expenses.

Almost $800,000 in total expenses alone are requested. The expenses that are being requested are simply ridiculous. $75,000 on air fare; $3,000 for meals; $122,000 on something called Evolve Discovery; $67,000 for lodging; $41,000 for copies; $52,000 for research. The list goes on and on. The expenses that are being requested are, as a whole, patently unreasonable and the Court awards none of them. In any event, most of these expenses were incurred in the administrative proceedings below, for which no award is made.

In addition, A.R.S. § 12-348(I)(1) provides that "fees and other expenses" include, other than attorneys' fees, only expert witnesses and "reasonable cost of any study, analysis, engineering report, test or project which the court finds to be directly related to and necessary for the presentation of the party's case." The requested expenses do not fall under these types of categories. Ron's contention that provision in the statute that allows recovery, in cases involving a review of an agency decision, of "fees and other expenses" in the contested case proceedings in which the decision was rendered somehow expands the definition of "fees and other expenses" to cover things other than those identified above is seriously misplaced. "Fees and other expenses" did not change its meaning between the first part of A.R.S. §12-348(I)(1) and the last part of that section. Nonetheless, no award is made for the administrative proceedings below, for the reasons stated above.

The Court finds and concludes that the fees spent on this matter which are being requested from this Court are unreasonable. Ron obviously hired high priced lawyers and gave them an open check book to do whatever they needed to do to "fight" Jerry and secure his racing license. While Ron can litigate as he pleases, there is no basis under the applicable statute for the Court to award anything close to what Ron is requesting.

As noted above, three other fine law firms with many fine lawyers were involved here. Why Ron needed four law firms to represent him is a complete mystery to this Court. GT, an outstanding firm, played a minor role here, yet incurred a little over $100,000 in fees. Kip Micuda

alone billed Ron over $100,000, but he too was a minor player. Steptoe and Johnson is another very good law firm. That firm incurred $225,000 in fees. As such, three firms playing minor roles managed to incur over $400,000 in fees.

The Orrick firm had a small army of timekeepers, 42, working on this matter. The Orrick firm, however, "generously" only billed Ron for 23 of those people and is only requesting fees for 15 of those folks. Orrick racked up well over $12M in fees on this matter, but is only asking for approximately $9.5M, due to "generous" discounts. Orrick claims that its fees were "more than reasonable." In reality, the fees were "more than unreasonable."

The billing records here are astonishing. Day after day, multiple lawyers were billing huge segments of time. It is hard to imagine what all of these people were doing. For example, on January 15, 2015, a day picked randomly by the Court, Grossman spent 8.5 hours, Van Oppen spent 7.7 hours, Novak spent 10.7 hours, Salas spent 13.5 hours and Harrison spent 7.5 hours. This is over 45 hours in just one day! The billing entries continue in such a fashion day after day.

All of this because of the denial of a racing license. The Court is willing to accept, for the sake of argument, that Ron firmly believes that he was treated unfairly. The Court is also willing to accept that Ron had to "litigate" in earnest at each step of the way. Ron did ultimately prevail. There is no doubt in the Court's mind, however, that the same result could have been reached at a fraction of the cost. Evidently, however, Ron did not care about the cost. He apparently authorized his "army" of lawyers to bill huge amounts of hours at extremely high rates to "fight" Jerry, the Department and the Commission. Again, Ron can do whatever he wants to do. He can hire the finest and most expensive lawyers on earth if he wants to do so. But to ask this Court to award the amount of fees being requested under the statute before the Court is patently unreasonable.

The fees incurred in this case are so unreasonable that they do not even present the Court with a starting point in determining a reasonable fee. The Court has tried to review the billing statements presented to the Court. The billing records are so replete with unreasonable time entries made by numerous time keepers that it is simply impossible to try to utilize those billing records as some type of measure of what was reasonable.

The Court believes that it is absolutely necessary to abide by the legislature's directive that recoverable fees be at fairly low rates. Given the cost of living increases, and the notion that this case did require some level of experience and sophistication, the Court will award fees at the rate of $250 an hour. In the Court's view, awarding fees at higher rates would violate the mandate of the legislature in drafting the statute at issue.

As noted above, the only fees that will be awarded are reasonable fees spent on the Judicial Review Proceedings. As such, the Court has to determine a reasonable fee for this appeal.

Again, the Orrick records are not helpful. The unreasonable billing practices continued through this appeal. Day after day, multiple lawyers were billing incredible amounts of time. The redundancy is simply astonishing. Hundreds and hundreds of hours were spent pouring over the briefs and the statement of facts. There must have been hundreds of drafts.

Incredibly, Ron is seeking approximately $4,500,000 just for the appeal in Superior Court. That is a mind boggling number. Indeed, it is simply astonishing. This was just an appeal. There was no evidentiary hearing or trial. There was no discovery. There was simply briefing and oral arguments. While the legal issues presented were somewhat complex, this appeal was fairly streamlined and straightforward. How $4.5 million could have been spent on this appeal is incomprehensible.

The justifications provided by Ron at oral argument were not convincing. For example, Ron did try to bifurcate the proceedings. He does in fact get some credit for making that attempt. However, that does not excuse Ron's lawyers from running up unreasonable amounts on time on the briefing when the bifurcation was unsuccessful. Similarly, the fact that Ron had to spend time preparing a "complicated" statements of fact hardly justify the amount of fees requested here.

The Court ordered four sets of briefs on this appeal. The length of the briefs varied from twelve to thirty five pages. Of course, reply briefs were also submitted. Accordingly, some very serious briefing did in fact take place here. Ron should be awarded a reasonable amount for this work.[2]

The Court finds and concludes that this appeal reasonably required approximately 800 hours of attorney time. As noted above, the proceeding in this Court was an appeal. It basically consisted of appeal briefs and an oral argument. Four sets of briefs were submitted. The Court finds that 200 hours for each set of briefing is reasonable. The Court acknowledges that the complexity of each set of briefs was different. Certainly, each set of briefing called for different amounts of time and energy. For example, the twelve page briefs, with eight page replies, certainly should have been accomplished with far less than 200 hours of time. However, the thirty five page brief, along with a twenty five page reply, could certainly reasonably entail more time. The Court finds and concludes, however, that 200 hours for each set of briefs is a reasonable average. As noted above, the Court has also considered the fact that Ron prevailed only on the standing issue. The Court also awards an additional 100 hours for the statement of facts and associated other tasks. The Court awards 900 hours of time at $250 per hour. Therefore, $225,000 in fees are awarded against the Commission.

[2] On a pro rata basis, Ron is requesting approximately $1,100,000 per brief.

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