

1 **Carpenter, Hazlewood, Delgado & Bolen, PLC**

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Chad Miesen 024910
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LIU. FOUNTSHAD.0025.1

5 *Attorneys for Defendant*

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF MARICOPA

8 PATRICIA BOCCHINO,

9 Plaintiff,

10 v.

11 FOUNTAIN SHADOWS
12 HOMEOWNERS ASSOCIATION,

13 Defendant.

Case No.: CV2015-012434

**DEFENDANT'S RESPONSE IN
OBJECTION TO PLAINTIFF'S
APPLICATION FOR AWARD OF
ATTORNEYS' FEES**

*(Assigned to the Honorable
Douglas Gerlach)*

14
15 Defendant Fountain Shadows Homeowners Association (the "**Association**"), by and
16 through undersigned counsel, hereby submits its Response in objection to Plaintiff's
17 Application for an Award of Attorneys' Fees. Plaintiff's request for an award of \$22,937.50
18 for attorneys' fees and costs is unreasonable. The Plaintiff failed to even attempt to resolve
19 the matter prior to litigation, failed to make good faith efforts to negotiate the amounts to
20 be awarded after the Court's ruling, requests legal fees that are improper, and requests legal
21 fees for claims that are not eligible for an award of attorneys' fees pursuant to A.R.S. §12-
22 341.01(A). The Association asks the Court to deny the Plaintiff's request.

1 **I. Introduction**

2 This action was brought by Plaintiff on October 28, 2015 for breach of contract,
3 breach of covenant of good faith and fair dealing, fraud/intentional misrepresentation,
4 negligent misrepresentation, and unjust enrichment alleging the Association had no basis to
5 assess the legal fees and costs it incurred to obtain the 2015 Injunction Against Workplace
6 Harassment Against her. The amount in controversy was only \$3,887.28. The parties filed
7 dispositive motions and on June 7, 2016, after full briefing and oral argument, the Court
8 granted Plaintiff's Motion for Summary Judgment and denied Defendant's Cross Motion for
9 Summary Judgment. The Court's July 27, 2016 minute entry states that Plaintiff must
10 undertake good faith efforts to negotiate with Association regarding the amounts to be
11 awarded. On August 26, 2016, Plaintiff filed its Application for Attorneys' Fees and
12 supporting affidavit.

13 Plaintiff did not undertake in good faith efforts to negotiate the amount to be
14 awarded; Plaintiff did not prevail on a breach of contract claim to be entitled to attorneys'
15 fees pursuant to A.R.S. § 12-341.01(A); the Declaration of Covenants, Conditions and
16 Restrictions does not authorize an award of attorney' fees to the Plaintiff; Plaintiff includes
17 improper attorneys' fees in her Application; and Plaintiff's attorney incurred unnecessary
18 and unreasonable legal fees in defending this matter. Therefore, the Association
19 respectfully requests a court refuse to award fees at all.

20 **II. Legal Argument**

21 **A. Plaintiff did not Undertake in Good Faith Efforts to Negotiate**

22

1 Plaintiff did not undertake in good faith efforts to negotiate the amounts to be
2 awarded. The Court instructed the Plaintiff to undertake in good faith efforts to negotiate
3 the amounts to be awarded. Specifically, the Court's July 27, 2016 minute entry, in
4 relevant part, provides:

5 Before submitting an application or statement, Bocchino must undertake
6 good faith efforts to negotiate a stipulation with the Association regarding the
7 amounts to be awarded. Such a stipulation will NOT preclude the Association
8 from raising any issue or asserting any argument on appeal other than the
9 reasonableness of the amounts awarded.

8 On July 28, 2016, the Plaintiff estimated her legal fees to exceed \$25,000 and offered
9 to reduce her legal fees to \$22,000 and stipulate to an amount to be awarded in her favor for
10 a total of \$26,339.78, which included \$3,887.28 in principal, \$22,000 in attorneys' fees, and
11 \$452.50 in costs. A copy of the July 28, 2016 letter attached hereto as **Exhibit A**. On
12 August 15, 2016, the Association offered to stipulate to an amount to be awarded in
13 Plaintiff's favor in the amount of \$15,000. A copy of the August 15, 2016 email attached
14 hereto as **Exhibit B**. On August 18, 2016, Plaintiff rejected the Association's offer and
15 made a second offer to settle for \$22,000. A copy of the August 18, 2016 email attached
16 hereto as **Exhibit C**. On August 22, 2016, the Association declined the offer and chose to
17 accept the judge's determination of the reasonableness of Plaintiff's legal fees. A copy of the
18 August 22, 2016 email attached hereto as **Exhibit D**.

19 The fact that the legal fees included in the Plaintiff's itemized invoice attached as
20 Exhibit A to the Declaration of Jonathan A. Dessales in Support of Application for Award
21 of Attorneys' Fees ("Dessales' Declaration") claim to have totaled \$22,937.50, not over
22 \$25,000 as the Plaintiff claimed in settlement communications with the Association, is

1 conclusive evidence that the Plaintiff was not acting in good faith when negotiating the
2 amounts to be awarded as was ordered by this Court.

3 Finally, Dessaulles' Declaration shows that on the same day that Jonathan Dessaulles
4 met with the Plaintiff, he began drafting the complaint. Parties are entitled to recover "a
5 reasonable attorney's fee for every item of service which, at the time rendered, would have
6 been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest."
7 *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983). A
8 reasonable attorney would have at least made at least one pre-litigation attempt to settle the
9 matter with the Association before filing the lawsuit. Counsel for Plaintiff did not do that,
10 which could have saved thousands of dollars. The timing of the complaint did not advance or
11 protect Plaintiff's interests, particularly since there was no impending statute of limitations that
12 would bar the claim if pre-litigation negotiations failed. From the beginning, the Plaintiff did
13 not make any good faith efforts to attempt to resolve this matter with the Association outside of
14 litigation, instead the Plaintiff immediately filed a lawsuit.

15 **B. Plaintiff Not Entitled to Legal Fees Pursuant to A.R.S. § 12-341.01(A)**

16 The Plaintiff did not prevail on a breach of contract claim. The Court's July 27, 2016
17 minute entry found that the Association's 2015 Injunction Against Workplace Harassment
18 was unenforceable because it was unconstitutional and that "by no recognized standard does
19 the Association's failure to obtain an injunction that complies with constitutional
20 requirements transform the Association into a successful, and thus, prevailing party."

21 Plaintiff did not dispute the validity or enforceability of the 2015 Injunction.
22 Instead, upon the Court's own review of the 2015 Injunction order, the Court found that

1 the 2015 Injunction granted by Manistee Justice Court was unconstitutional and therefore,
2 unenforceable and not the result that the Association intended to achieve when it initiated
3 the injunction action against the Plaintiff.

4 **C. The Declaration Does Not Entitle The Plaintiff to Legal Fees**

5 Plaintiff cannot rely on the Declaration for an award of attorneys' fees related to the
6 cost of defense because the Declaration does not entitle her to attorney's fees. Specifically,
7 Article XVII, Section 1, in relevant part, provides:

8 In the event the Association employs an attorney or attorneys to enforce the
9 collection of any amounts due pursuant to this Declaration or in connection
10 with any lien provided for herein, or the foreclosure thereof, or to enforce
11 compliance with or specific performance of the terms and conditions of this
12 Declaration, the Owner, Owners and parties against whom the action is
13 brought shall pay all attorneys' fees and costs and expenses thereby incurred
14 by the Association in the event the Association prevails in any such action.

15 A party may not recover attorney fees unless they are provided for by statute or by
16 agreement between the parties. *Campbell v. Florence Gardens Mobile Home Ass'n*, 2 CA-
17 CV 2013-0031, 2014 WL 897152, at *2 (App. Mar. 7, 2014). The Declaration constitutes a
18 contract between the Association and the homeowners. *See McDowell Mountain Ranch*
19 *Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, 269, ¶ 14, 165 P.3d 667, 670 (App. 2007).
20 Here, the Declaration only entitles the Association to an award of attorneys' fees in the
21 event that the Association prevails in any such action. The Declaration does not entitle the
22 Plaintiff to her legal fees in this matter.

23 **D. Improperly Claimed Attorneys' Fees**

24 Plaintiff's Application for Attorneys' Fees is improper and contains deficiencies.
25 Plaintiff's Declaration includes at least two charges that are improper. First, Plaintiff is

1 asking for legal fees incurred on October 1, 2015 to draft a Notice of Appearance for
2 Nancy Fisher. Nancy Fisher is not a party to or is otherwise involved in this case. Second,
3 Dessaulles' Declaration includes time to research issues related a homeowners association's
4 lien. Specifically, Dessaulles' Declaration includes legal fees incurred February 11, 2016 to
5 review and analyze a purchase contract. The Plaintiff alleged that the Association did not
6 have the authority to include the legal fees it incurred to obtain the 2015 Injunction against
7 her in her resale disclosure statements, the terms of a sales contract that does not involve
8 the Association is unrelated to her claims. No award should be given for these amounts.

9 These entries put in to question the remaining billing entries because they are not
10 specific enough to determine whether the charges were in fact incurred by the Plaintiff.
11 Deficiencies in the affidavit make it difficult to determine a precise figure that represents a
12 reasonable attorneys' fee award.

13 **E. The Total Amount of Time Expended by Plaintiff Was Unnecessary**

14 Plaintiff's attorneys' fees are not reasonable, because the total amount of time
15 expended by Plaintiff exceeds the amount of legal work necessary for this case. Pursuant to
16 *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983), Arizona
17 law requires that an award of attorneys' fees be reasonable. Reasonableness is determined by
18 consideration of the quality of the attorney, the character of the work to be done, the work
19 actually performed by the attorney, and the result. *Id.* citing *Scwartz v. Schwerin*, 35 Ariz.
20 242, 336 P.2d 144 (1959).

21 This matter involved a single issue: whether the Declaration entitles the Association to
22 the legal fees incurred by the Association, totaling only \$3,887.28, to obtain an injunction

1 against workplace harassment against the Plaintiff. The fact that this matter involved an issue
2 that was not particularly complex and given the very small amount in dispute, the amount of
3 time Plaintiff's counsel spent on this matter was not warranted.

4 First, Dessaulles' Declaration includes over fifty-seven (57) hours, totaling \$9,677.50,
5 to draft Plaintiff's ten-page Motion for Summary Judgment and five-page Statement of Facts
6 (collectively, the "Motion"). Even after Jonathan Dessaulles, a seasoned attorney and law firm
7 partner at the highest billing rate, spent over seven (7) hours to outline and revise the Motion,
8 an incredible amount of time in itself, his Associate Ashely Hill then spent over an additional
9 twenty-one (21) hours to continue drafting the Motion before filing. Fifty-seven hours is, on
10 its face, an unreasonable amount of time to spend drafting a motion for summary judgment
11 over a total in dispute of \$3,887.28.

12 Second, Dessaulles' Declaration includes over twenty-five (25) hours, totaling
13 \$4,142.50, to draft an eight-page Reply in support of its Motion for Summary Judgment and
14 Response to the Association's Cross Motion for Summary Judgment (this included a two-
15 page controverting statement of facts), including almost eleven (11) hours on April 13, 2016
16 to "[b]egin drafting Reply in Support of Motion for Summary Judgment." Again, the legal
17 issue before the Court, while lacking Arizona case law on the topic, is not particularly
18 complex. As such, Plaintiff's Motion for Summary Judgment was standard, merely arguing
19 that the factual allegations did not support the Association's application of attorney fee
20 provision of the Declaration to collect the legal fees it incurred to obtain the injunction against
21 workplace harassment.

22

1 Third, even after apparently spending over eighty (80) hours to fully brief their Motion
2 for Summary Judgment, Dessaulles' Declaration includes over an additional seven and a half
3 (7.5) hours, totaling \$1,557.50, preparing for and attending oral argument for the Motion,
4 originally scheduled for a total of 30 minutes. The time purportedly spent to prepare and argue
5 Plaintiff's Motion is extremely excessive given the nature of the case.

6 **III. Conclusion**

7 Based on the foregoing, Plaintiff's attorneys' fees are unreasonable and should not be
8 awarded. Plaintiff did not undertake in good faith efforts to negotiate the amount to be
9 awarded; Plaintiff is not entitled to an award of attorneys' fees pursuant to A.R.S. § 12-
10 341.01(A) or the Declaration of Covenants, Conditions and Restrictions; Plaintiff includes
11 improper attorneys' fees in her Application; and Plaintiff's attorney incurred unnecessary
12 and unreasonable legal fees in defending this matter. Defendant requests that the Court deny
13 Plaintiff's Application for Attorneys' Fees in its entirety. To the extent that the Court is
14 inclined to award some fees to Plaintiff despite the arguments presented herein, the Association
15 respectfully requests that those fees be significantly limited.

16 RESPECTFULLY SUBMITTED this 19th day of September, 2016.

17 **Carpenter, Hazlewood, Delgado & Bolen, PLC**

18 

19 _____
Chad P. Miesen
Charlene Cruz
20 1400 East Southern Avenue, Suite 400
21 Tempe, Arizona 85282
Attorneys for the Association

1 ORIGINAL of the foregoing filed
2 this 19th day of September with:

3 Clerk of the Court
4 Maricopa County Superior Court
5 www.AZTurboCourt.gov

6 Copy of the foregoing emailed and mailed
7 this 19th day of September, 2016, to:

8 Jonathan A. Dessauls
9 Dessauls Law Group
10 5353 North 16th Street, Suite 110
11 Phoenix, Arizona 85016

12
13
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15
16
17
18
19
20
21
22




Jonathan A. Dessaules

Direct Line: 602.274.2360
jdessaules@dessauleslaw.com

July 28, 2016

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Chad P. Miesen
CARPENTER HAZLEWOOD, DELGADO & BOLEN, PC
1400 E. Southern Avenue, Suite 400
Tempe, AZ 85282

Re: *Bocchino v. Fountain Shadows HOA*
Case No.: CV2015-012434

Dear Chad:

Plaintiff's legal fees and costs presently total \$23,455.00 and \$452.50, respectively. When we factor in additional time relating to the preparation and submission of the fee application and reply, we estimate that our fees will exceed \$25,000.

After the Court encouraged us at oral argument to attempt to resolve this matter in good faith, we unilaterally offered to reduce our fees and costs to \$20,000 in order to resolve this matter before the Court had to issue its ruling. Your office countered with a total offer (inclusive of principal, fees, and costs) of \$5,000. When one backs out the \$3,887.28 that Ms. Bocchino is owed and the \$452.50 in costs, the reality is that you offered just \$660.22 in legal fees.

In furtherance of the Court's direction that we undertake good faith efforts to negotiate a stipulation with the Association on the amounts to be awarded, we propose to reduce our legal fees to \$22,000, so that the final judgment in this matter would award Ms. Bocchino as follows: \$3,887.28 in principal, \$22,000 in legal fees, and \$452.50 in costs. This represents a unilateral reduction of our legal fees of nearly 10%. Although we believe that all of our fees in this matter were reasonable and necessary, we are offering this reduction solely in the hopes of avoiding further litigation before entry of the final judgment. As the Court noted in its minute entry, such a stipulation will not preclude the Association from raising

any issue or asserting any argument on appeal other than the reasonableness of the amounts awarded.

We ask that you advise us no later than August 5, 2016 whether you will stipulate to the amounts of fees and costs to be awarded.

Sincerely,

Jonathan A. Dessales

Jonathan A. Dessales

From: [Charlene Cruz](#)
To: [Jon Dessaulles](#)
Cc: [Jenna Pitchel](#); [Ashley Hill](#); [Vicki J. Goslin](#)
Subject: RE: Bocchino v. FSHOA
Date: Monday, August 15, 2016 12:49:00 PM

Jonathan:

The board has considered and rejected your client's offer to settle for a total of \$26,339.78, which includes \$3,887.28 in principal sum, \$22,000 in fees and \$452.50 in costs. The court's order directs your client to undertake good faith efforts to negotiate amounts to be awarded. However, her current offer is over \$2400 more than the offer she made the month prior.

The board offers to settle for \$15,000 total for the principal sum and her legal fees and costs. Please let us know if this is acceptable for your client.



CARPENTER HAZLEWOOD

Charlene Cruz, Esq.

Direct Line: 480-427-2882

Charlene.Cruz@carpenterhazlewood.com

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From: Jon Dessaulles [mailto:jdessaulles@dessaulleslaw.com]

Sent: Friday, August 05, 2016 1:20 PM

To: Charlene Cruz

Cc: Jenna Pitchel; Ashley Hill; Vicki J. Goslin

Subject: Re: Bocchino v. FSHOA

That's fine.

EXHIBIT
B

Jonathan A. Dessales
Dessaules Law Group
<tel:602.274.2360>

On Aug 5, 2016, at 12:09 PM, Charlene Cruz <Charlene.Cruz@carpenterhazlewood.com> wrote:

Jonathan:
Can the Association have an extension to respond to your settlement offer? The Board is in the process of making a decision.
Thank you.

[<image005.jpg>](#)

Charlene Cruz, Esq.
Direct Line: 480-427-2882
Charlene.Cruz@carpenterhazlewood.com

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From: Chad Miesen
Sent: Thursday, July 28, 2016 10:39 AM
To: 'Jenna Pitchel'
Cc: Jon Dessales; Ashley Hill; Charlene Cruz; Vicki J. Goslin
Subject: RE: Bocchino v. FSHOA

Thank you. We will get back with you.



Chad Miesen, Esq.

Direct Line: 480-427-2860

chad.miesen@carpenterhazlewood.com

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From: Jenna Pitchel [<mailto:jpitchel@dessaulslaw.com>]

Sent: Thursday, July 28, 2016 10:17 AM

To: Chad Miesen

Cc: Jon Dessaulles; Ashley Hill

Subject: Bocchino v. FSHOA

Mr. Miesen,

Please see the attached correspondence.

From: [Jon Dessauls](#)
To: [Charlene Cruz](#)
Cc: [Jenna Pichel](#); [Ashley Hill](#); [Vicki J. Goslin](#)
Subject: Re: Bocchino v. FSHOA
Date: Thursday, August 18, 2016 8:34:42 PM

Charlene:

Sorry, I've been in trial all week.

You are correct that our current offer is greater than our previous offer. We have incurred significant attorneys' fees litigating an issue that we should not have had to litigate. We are confident that the Court will agree that the association's position in this case was entirely baseless. We could start with the fact that you initially offered less than \$600 in attorneys' fees to settle this dispute last month. While I appreciate your willingness to increase your offer in light of the adverse ruling, the fact remains that these are fees that have been incurred. While our offer may be greater than our previous offer, it still represents a significant reduction of our legal fees.

Notwithstanding the above, we would be willing to accept for a total \$22,000.00 if we can get this wrapped up by next Wednesday. When one subtracts out the \$3,887.28 and the \$452.50 in costs, this represents legal fees of \$17,660.22 — a reduction of approximately \$6,000.

Our deadline to file our fee application is next Friday, so we need to know by Wednesday.

JONATHAN A. DESSAULES



5353 North 16th Street, Suite 110
Phoenix, Arizona 85016
602.274.5400 tel.
602.274.2360 direct
602.274.5401 fax
jdessauls@dessaulslaw.com

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On Aug 15, 2016, at 12:50 PM, Charlene Cruz
<Charlene.Cruz@carpenterhazlewood.com> wrote:

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The board has considered and rejected your client's offer to settle for a total of \$26,339.78, which includes \$3,887.28 in principal sum, \$22,000 in fees and \$452.50 in costs. The court's order directs your client to undertake good faith efforts to negotiate amounts to be awarded. However, her current offer is over \$2400 more than the offer she made the month prior.

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<[image005.jpg](#)>

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Cc: Jenna Pitchel; Ashley Hill; Vicki J. Goslin

Subject: Re: Bocchino v. FSHOA

That's fine.

Jonathan A. Dessaulles
Dessaules Law Group

<tel:602.274.2360>

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Subject: RE: Bocchino v. FSHOA

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Sent: Thursday, July 28, 2016 10:17 AM

To: Chad Miesen

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Please see the attached correspondence.

From: [Charlene Cruz](#)
To: [Jon Dessaulles](#)
Cc: [Jenna Pitchel](#); [Ashley Hill](#); [Vicki J. Goslin](#)
Subject: RE: Bocchino v. FSHOA
Date: Monday, August 22, 2016 11:11:00 AM

Jonathan:

The board has reviewed and rejected your client's offer to settle for \$22,000. They are willing to accept the judge's determination on the reasonableness of your legal fees.

Thank you.



CARPENTER HAZLEWOOD

Charlene Cruz, Esq.

Direct Line: 480-427-2882

Charlene.Cruz@carpenterhazlewood.com

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From: Jon Dessaulles [mailto:jdessaules@dessaulleslaw.com]

Sent: Thursday, August 18, 2016 8:35 PM

To: Charlene Cruz

Cc: Jenna Pitchel; Ashley Hill; Vicki J. Goslin

Subject: Re: Bocchino v. FSHOA

Charlene:

Sorry, I've been in trial all week.

EXHIBIT
D

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Our deadline to file our fee application is next Friday, so we need to know by Wednesday.

JONATHAN A. DESSAULES



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On Aug 15, 2016, at 12:50 PM, Charlene Cruz
<Charlene.Cruz@carpenterhazlewood.com> wrote:

Jonathan:

The board has considered and rejected your client's offer to settle for a total of \$26,339.78, which includes \$3,887.28 in principal sum, \$22,000 in fees and \$452.50 in costs. The court's order directs your client to undertake good faith efforts to negotiate amounts to be

awarded. However, her current offer is over \$2400 more than the offer she made the month prior.

The board offers to settle for \$15,000 total for the principal sum and her legal fees and costs. Please let us know if this is acceptable for your client.

[<image005.jpg>](#)

Charlene Cruz, Esq.

Direct Line: 480-427-2882

Charlene.Cruz@carpenterhazlewood.com

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, PLC

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[<image006.jpg>](#)

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From: Jon Dessauls [<mailto:jdessaules@dessaulslaw.com>]

Sent: Friday, August 05, 2016 1:20 PM

To: Charlene Cruz

Cc: Jenna Pitchel; Ashley Hill; Vicki J. Goslin

Subject: Re: Bocchino v. FSHOA

That's fine.

Jonathan A. Dessauls

Dessaules Law Group

<tel:602.274.2360>

On Aug 5, 2016, at 12:09 PM, Charlene Cruz

[<Charlene.Cruz@carpenterhazlewood.com>](mailto:Charlene.Cruz@carpenterhazlewood.com) wrote:

Jonathan:

Can the Association have an extension to respond to your settlement offer? The Board is in the process of making a decision.

Thank you.

[<image005.jpg>](#)

Charlene Cruz, Esq.

Direct Line: 480-427-2882

Charlene.Cruz@carpenterhazlewood.com

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From: Chad Miesen

Sent: Thursday, July 28, 2016 10:39 AM

To: 'Jenna Pitchel'

Cc: Jon Dessaulles; Ashley Hill; Charlene Cruz; Vicki J. Goslin

Subject: RE: Bocchino v. FSHOA

Thank you. We will get back with you.

Chad Miesen, Esq.

Direct Line: 480-427-2860

chad.miesen@carpenterhazlewood.com

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This firm is a debt collector. Any information obtained will be used for that purpose.

From: Jenna Pitchel [<mailto:jpitchel@dessauleslaw.com>]
Sent: Thursday, July 28, 2016 10:17 AM
To: Chad Miesen
Cc: Jon Dessaulles; Ashley Hill
Subject: Bocchino v. FSHOA

Mr. Miesen,
Please see the attached correspondence.