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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 LAVEEN MEADOWS HOMEOWNERS’  
14 ASSOCIATION, an Arizona non-profit  
15 corporation,

16 Plaintiff,

17 vs.

18 CARLOS MEJIA, a married man, as his sole  
19 and separate proeprty; *et al.*,

20 Defendants.

No. CV2016-094391

PLAINTIFF’S PRE-HEARING  
MEMORANDUM

(Assigned to the Honorable Margaret Benny)

21 Plaintiff, Laveen Meadows Homeowners Association, Inc. (“Association”), by and through  
22 counsel undersigned, hereby submits its Pre-Hearing Memorandum regarding the Damages Hearing  
23 scheduled for June 20, 2017.

24 **I. SCOPE OF HEARING**

25 On June 9, 2017, the Court entered an order denying Defendant Carlos Mejia’s Motion to  
26 Set Aside Default, and setting an evidentiary hearing regarding damages. “A party against whom  
default is entered loses the right to litigate liability, but may still appear in the action to contest  
damages.” *BYS Inc. v. Smoudi*, 228 Ariz. 573, 578, 269 P.3d 1197, 1202 (App. 2012) (citing *Tarr v.*  
*Superior Court*, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984)). The entry of default constitutes a

1 judicial admission of liability, but a defendant in default may contest the amount of damages. *See*  
2 *Dungan v. Superior Court In and For Pinal Cnty.*, 20 Ariz. App. 289, 290, 512 P.2d 52, 53 (App.  
3 1973); *see also Mayhew v. McDougall*, 16 Ariz. App. 125, 130, 491 P.2d 848, 853 (App. 1971)  
4 (holding that a default judgment was set aside, but not default, and permitting the defendant to  
5 contest damages only). Furthermore, in accordance with Rule 12(h), Arizona Rules of Civil  
6 Procedure (“ARCP”), “A party waives all defenses and objections which that party does not present  
7 either by [a Rule 12(b) Motion to Dismiss], or, if that party has made no motion, in that party’s  
8 answer or reply...” Rule 8(d), ARCP further states: “Averments in a pleading to which a  
9 responsive pleading is required, other than those as to the *amount* of damage, are admitted when not  
10 denied in the responsive pleading.” (Emphasis added). *See also Hughes Aircraft Co. v. Industrial*  
11 *Commission* 125 Ariz. 1, 4, 606 P.2d 819, 822. No responsive pleading has been filed, therefore all  
12 affirmative defenses that could have been raised have been waived. Thus, the only issue properly  
13 within the scope of the Damages Hearing is the *amount* of damages to which Plaintiff is entitled.  
14 Any issues relating to liability are not properly before the Court. In particular, Defendant has raised  
15 several arguments relating to liability and Plaintiff’s entitlement to entry of a foreclosure judgment  
16 that are not properly raised. The Court should disregard those arguments.

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19 Defendant’s counsel was advised at the prior hearing that no further briefing was necessary  
20 on the issues to be presented at the damages hearing. Defendant disregarded the Court’s  
21 admonition and filed a brief. The brief filed failed to advise the Court of the relevant Rules of Civil  
22 Procedure and failed to address additional issues that clearly are contrary to the positions set forth in  
23 Defendant’s hearing memorandum. As such, Defendant’s actions necessitated the filing of this  
24 brief to correct the record, thereby necessitating Plaintiff to once again incur otherwise unnecessary  
25 attorney fees.  
26

1           **A. Plaintiff is Entitled to a Foreclosure Judgment**

2           Plaintiff's entitlement to foreclose on the subject property is a question of liability, and as a  
3 result, the Defendant, who is in default, has lost the ability to argue the Plaintiff's ability to  
4 foreclose. However, in the interest of thoroughness, Plaintiff addresses this argument for the Court's  
5 benefit. As alleged in the Complaint, the Declaration of Covenants, Conditions and Restrictions  
6 ("CC&Rs") and Arizona law provide independent bases for the entry of a foreclosure judgment.

7                           **1. Contractual Lien**

8           Arizona case law provides that "[w]hen a grantee accepts a deed containing restrictions, he  
9 assents to these restrictions and is bound to their performance as effectively as if he had executed an  
10 instrument containing them." *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333,  
11 565 P.2d 207, 210 (App. 1977) (citations omitted). Defendant, by accepting the deed, became  
12 bound by the Declaration and obligated to pay the amounts charged against the Property by the  
13 Association.  
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15           Furthermore, the Declaration constitutes a contract between the subdivision's property  
16 owners as a whole and the individual lot owners. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177  
17 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993); *see also Pinetop Lakes Ass'n v. Hatch*, 135 Ariz.  
18 196, 198, 659 P.2d 1341, 1343 (App. 1983) (a "grantee who accepts a deed containing covenants  
19 has entered into a contractual relationship").  
20

21           Under the CC&Rs, the Plaintiff has a lien against each lot securing payment of "all present  
22 and future Assessments assessed or levied against such Lot or the Owner thereof (together with any  
23 present or future charges, fines, penalties or other amounts levied against such Lot or the Owner  
24 thereof pursuant to this Declaration or any of the other Property Documents)." **Exhibit A**, Section  
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1 8.3. The Plaintiff's lien "may be foreclosed in the manner provided by law for the foreclosure of  
2 mortgages." *Id.*

3 The amount secured by the lien is established by the ledgers provided and to be produced at  
4 the Damages Hearing. **Exhibit B**, Ledger. By providing an accounting that supports the figures used  
5 in the Complaint and Form of Judgment, Plaintiff has made a *prima facie* showing of the amount  
6 secured by the Plaintiff's lien. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, 17 P.3d  
7 790, 793 (App. 2000). Unlike the statutory lien, addressed below, the Plaintiff's lien has no  
8 limitation on the threshold for foreclosure of its lien. The only limitation is that the lien "may be  
9 foreclosed in the manner provided by law for the foreclosure of mortgages." **Exhibit A**, CC&Rs,  
10 Section 8.3. Under Arizona law, "Mortgages of real property and deeds of trust of a type not  
11 included in the definition of deed of trust provided in section 33-801, notwithstanding any other  
12 provision in the mortgage or deed, shall be foreclosed by action in a court." A.R.S. § 33-721. There  
13 is no monetary or time threshold for foreclosing on a mortgage, and thus no such limitation  
14 associated with the Plaintiff's contractual lien under the CC&Rs. As a result, anything short of full  
15 redemption of the Plaintiff's lien cannot prevent the entry of a foreclosure judgment.  
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18 Defendant has not provided any evidence of payments not already accounted for by the  
19 Association. Defendant has been given credit for all payments, including the \$5,000.00 tendered on  
20 April 14, 2017, after the filing of the foreclosure, yet the Plaintiff's lien on the property remains. As  
21 a result, Plaintiff is entitled to a foreclosure judgment on its contractual lien.

## 22 2. Statutory Lien

23 Independent of the Association's contractual lien, Arizona law has provided for an  
24 assessment lien for planned communities. Pursuant to Arizona statute:  
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The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. The association's lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed on if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first . . . .

A.R.S. § 33-1807(A). The statutory lien has a threshold that must be met before foreclosure under the statute can be filed, which is that the assessments must be unpaid for a year or more, or reach an amount of \$1,200.00 or more. *Id.* Although only one condition must be met, both were met prior to the foreclosure of the statutory lien. **Exhibit B**, Ledger. Pursuant to statute, the Association has thus foreclosed its statutory lien. *See* A.R.S. § 33-721 ("Mortgages of real property . . . shall be foreclosed by action in a court.").

Defendant has tendered \$5,000.00 in partial payment with the intention to divest this Court of jurisdiction over the statutory lien foreclosure. However, jurisdiction does not work that way. Jurisdiction over a controversy, once vested, may not be divested by subsequent events, actions or omissions of the parties. *See, e.g., Daou v. Harris*, 139 Ariz. 353, 356, 678 P.2d 934, 937 (1984); *Schoenberger v. Bd. of Adjustment*, 124 Ariz. 528, 606 P.2d 18 (1980); *am. Smelting & Ref. Co. v. Ariz. Air Pollution Control Hearing Bd.*, 113 Ariz. 243, 550 P.2d 621 (1976); *Whitfield Transp. v. Brooks*, 81 Ariz. 136, 302 P.2d 526 (1956). "This is because 'jurisdiction is established at the time of the filing of the lawsuit and cannot be ousted by subsequent actions or events.'" *Fry v. Garcia*, 213 Ariz. 70, 73 ¶ 10, 138 P.3d 1197, 1200 (App. 2006) (emphasis added) (citing *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 869 P.2d 183 (App. 1993)).

1           Therefore, once the statutory threshold has been met and the association files suit, it can  
2 foreclose on *all* of the amounts secured by the lien, even if the defendant pays the past due  
3 assessments because jurisdiction was established at the time of filing the lawsuit and cannot be  
4 ousted by subsequent actions or events, including Defendant’s partial payment. The Plaintiff here  
5 met the threshold at the time of filing suit, and Defendant has failed to pay all amounts secured  
6 by the lien. Thus, the Association has the right to continue its foreclosure pursuant to the statute.

7           The present scenario is also akin to a mortgage foreclosure. The mortgagee is not  
8 required to cease the foreclosure just because a borrower tenders the late payments. Instead, the  
9 mortgagor is required to pay all the amounts due and owing, *i.e.*, redeem the lien, in order to  
10 stop the foreclosure action. There is no reason to treat association foreclosures differently,  
11 especially when A.R.S. § 33-1807(A) specifically references that HOA “assessments may be  
12 foreclosed in the same manner as a mortgage on real estate . . . .”

13           In addition, the legislative history of A.R.S. § 33-1807 shows that the Arizona legislature  
14 did not intend for such an absurd result. The legislative Final Amended Fact Sheet for S.B. 1007  
15 contains and discusses the language of the bill that became the current version of A.R.S. § 33-  
16 1807(A), and is attached as **Exhibit C**. The very first sentence in the Provisions section of the  
17 Final Amended Fact Sheet for S.B. 1007 confirms the intent of A.R.S. § 33-1807, which is to  
18 “[p]rohibit[] foreclosure by and HOA *until* an owner has been delinquent in the payment of  
19 monies secured by a lien, excluding reasonable collection fees, reasonable attorney fees and  
20 charges for late payment of those assessments, for a period of one year or in the amount of  
21 \$1,200.00 or more, whichever occurs first.” (Emphasis added.) The term “until” is defined by the  
22 Oxford Dictionary as “[u]p to (the point in time for the event mentioned).” *See* Oxford  
23 Dictionary, available at [http://www.oxforddictionaries.com/us/definition/american\\_english/until](http://www.oxforddictionaries.com/us/definition/american_english/until).  
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1 Similarly, Black's Law Dictionary defines "until" as "[u]p to time of. A word of limitation, used  
2 ordinarily to restrict that which proceeds to what immediately follows it, and its office is **to fix**  
3 **some point of time or some event** upon the arrival or occurrence of which what precedes will  
4 cease to exist." Black's Law Dictionary 1380 (5<sup>th</sup> ed. 1979) (emphasis added); *see also Empire*  
5 *Oil and Refining Co. v. Babson*, 182 Okl. 336, 77 P.2d 682, 684.

6 Thus the Arizona legislature intended the statute to establish "a fixed point in time" that  
7 triggers an association's right to file a statutory lien foreclosure pursuant to A.R.S. § 33-1807. In  
8 other words, once an owner has been delinquent in assessments for one year or in the amount of  
9 \$1,200.00, the Association's foreclosure claim is ripe, and the Court has jurisdiction over the  
10 statutory foreclosure claim. The legislative history cuts against any argument that a foreclosure  
11 claim properly filed with the Court can be undone by any arbitrary partial payment by the owner  
12 after the complaint has been filed. Any other interpretation would impose an onerous and taxing  
13 requirement on associations that incur the time and expense of collection efforts over months and  
14 years only to have a defendant defeat a foreclosure claim with a partial payment that ignores the  
15 thousands incurred by the Association in collection costs and attorney fees. Such a position, if  
16 upheld by the Court, would encourage waste and gamesmanship by delinquent homeowners,  
17 resulting in an inadequate remedy to an association that is a forced creditor in this context, and  
18 would force responsible homeowners to subsidize assessment delinquencies. The Arizona  
19 legislature did not intend such a result, nor does the statutory language support such an approach.  
20 As a result, Defendant's partial tender does not eliminate the Plaintiff's ability to pursue  
21 foreclosure.

22 Defendant argues, "It is illogical to argue that a homeowner could avoid foreclosure by  
23 paying just the past due assessments, without the legal fees, the day before the association files  
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1 Defendant, and then foreclose on its lien against the property. The doctrine of merger does not  
2 apply. *See also In re Reece* 274 B.R. 515.

3 Defendant raises five other arguments, which he fails to develop, and as a result, those  
4 arguments are waived. However, Plaintiff addresses them here in the event the Court has  
5 concerns about their validity: (i) the applicable statute of limitations for a contractual lien is six  
6 years, pursuant to A.R.S. § 12-548, so the Plaintiff is permitted to bring an action to foreclose on  
7 its contractual lien for all amounts secured by its lien for the last six years. (ii) Plaintiff has not  
8 categorized any attorney fees as “assessments” for purposes of the statutory lien foreclosure, and  
9 Defendant can provide no instance in which Plaintiff has done so; (iii) pursuant to A.R.S. § 33-  
10 1101(A)(1), the homestead exemption does not apply, as this is a consensual lien; (iv) the  
11 judgment renewal statute does not apply, by Defendant’s admission, because the previous  
12 judgment is dated 2013; and (v) there has been no double recovery, nor can Defendant show  
13 there has been an attempt to collect any amounts already paid. Defendant’s arguments are  
14 without merit and should be disregarded for numerous reasons, including the fact that Defendant  
15 is in default and can only dispute damages, and Arizona law does not support any of them.  
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18 **B. Plaintiff is Entitled to Principal in the Amount of \$3,843.48.**

19 In its Form of Judgment submitted on March 31, 2017, Plaintiff requested that the Court  
20 enter Judgment in the principal sum of \$8,843.48, with additional amounts accruing as of  
21 January 1, 2018. *See* Form of Judgment. The principal balance is supported by the Association’s  
22 ledger. **Exhibit B**, Ledger. Then, on or about April 14, 2017, Defendant tendered a payment of  
23 \$5,000.00. **Exhibit D**, Payment. In accordance with Arizona law, the payment was accepted and  
24 applied to the principal lien balance, leaving a remaining balance of \$3,843.48.  
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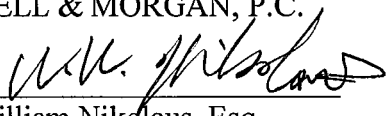
1 The Plaintiff is also entitled to prejudgment interest from May 9, 2016 at the rate of \$2.26  
2 per diem, pursuant to A.R.S. § 44-1201(F). In addition, Plaintiff is entitled to post-judgment  
3 interest at the rate of ten percent (10%) per annum pursuant to Section 8.2 of the CC&Rs.  
4 Pursuant to the CC&Rs and A.R.S. § 33-1807, Plaintiff is entitled to an award of attorney fees  
5 and costs, including fees and costs incurred since submission of the form of judgment. All of  
6 these amounts are secured by the Association's lien.

7 **III. CONCLUSION**

8 The scope of the Damages Hearing is limited to the amount of damages. The Court should  
9 disregard any argument by Defendant related to liability, including whether Plaintiff is entitled to  
10 foreclose because Defendant is in default. In the event that the Court does consider argument  
11 regarding Plaintiff's entitlement to foreclosure, the Plaintiff's lien has not been satisfied by  
12 Defendant's partial payment, and the Court must enter a foreclosure judgment. Plaintiff will submit  
13 an updated form of judgment for the entry.

14 Dated this 19<sup>th</sup> day of June, 2017.

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16  
17 MAXWELL & MORGAN, P.C.

18 By   
19 W. William Nikolaus, Esq.  
20 4854 East Baseline Road, Ste. 104  
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22 Attorneys for Plaintiff

23 COPY of the foregoing submitted for  
24 E-filing this 19 day of June, 2017, to:

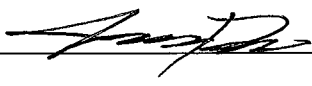
25 Clerk of the Court  
26 Maricopa County Superior Court

1 And hand-delivered to court chambers of  
2 Honorable Margaret Benny

3 COPY of the foregoing  
4 e-mailed this 19 day of  
5 June, 2017, to:

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