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9 *Attorneys for Defendant*

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

11 IN AND FOR THE COUNTY OF MARICOPA

12 LAVEEN MEADOWS HOMEOWNERS'  
13 ASSOCIATION, INC., an Arizona nonprofit  
14 corporation,

15 Plaintiff,

16 vs.

17 CARLOS MEJIA, a married man, as his sole  
18 and separate property; et al.,

19 Defendants.

No. CV2016-094391

**RESPONSE TO PLAINTIFF'S  
APPLICATION FOR FEES AND COSTS**

20 **INTRODUCTION**

21 Plaintiff has deliberately understated the attorneys' fees it is asking the Court to award in  
22 this case. Although its "Supplemental Application for Amount of Attorneys' Fees" asks for "an  
23 amount not less than \$16,340.00," Plaintiff's counsel omits mentioning the thousands of dollars in  
24 line-item attorneys' fees charges that Plaintiff's counsel has included in the "principal balance" that  
25 they also excluded from the *China Doll* affidavit. Even this figure is understated, to be fair,  
26 because Plaintiff "reserves the right...to increase its attorney fees request in the event Defendant  
objects to the fee request." And considering Plaintiff's counsel's inclusion of self-serving  
language in the judgment it submitted, purporting to award future attorneys' fees "not otherwise  
addressed herein," the \$20,000.00 it presently seeks appears to be just the tip of the proverbial  
iceberg.

1 The fees presently sought are already more than tenfold the unpaid assessments and late  
2 fees due at the commencement of this action that indisputably have been paid. Because Defendant  
3 Carlos Mejia (“Mejia”) lacked the clairvoyance to ascertain the attorneys’ fees and costs that this  
4 Court eventually will award, though he did tender an unconditional payment in an amount  
5 significantly more than just the assessments and late fees, the Court has ruled that Plaintiff can  
6 foreclose solely to collect the attorneys’ fees and costs that it has not yet awarded in this action.

7 The amount sought shocks the conscience and exceeds all bounds of reasonableness. For  
8 the following reasons, the Court should find that the fees requested are patently unreasonable and  
9 clearly excessive.

#### 10 ARGUMENT

11 **I. ANY FEE AWARD MUST BE REDUCED BY THE FEES THAT PLAINTIFF**  
12 **IMPROPERLY INCLUDED AS PART OF THE “PRINCIPAL SUM” FOR WHICH**  
13 **PLAINTIFF HAS OFFERED NO EVIDENCE OF REASONABLENESS.**

14 Plaintiff’s serial fee applications seek a combined \$16,340.00, and counting, in attorneys’  
15 fees. In reviewing the *China Doll* affidavits submitted in conjunction with both applications,  
16 Plaintiff has submitted itemized history bills for May 9, 2016 through June 19, 2017. What  
17 Plaintiff has not submitted, however, is any breakdown of the fees incurred before May 9, 2016.  
18 Although Plaintiff’s ledger reflects substantial attorneys’ fees charges dating back to at least  
19 September 2013, Plaintiff has included these non-itemized amounts as line-item charges to be  
20 awarded as part of the principal sum.

21 Attorneys’ fees are ancillary to the principal balance (which here, there is none as admitted  
22 by the Association’s own witness). To be entitled to attorneys’ fees, a litigant must demonstrate  
23 that they are reasonable. This is done by submitting an affidavit and ordinarily an itemization of the  
24 time entries in accordance with Rule 54(f) and the *China Doll* case. The Court and not the  
25 proponent of the fee request, is the arbiter of the reasonableness of fees. Without this itemization, it  
26 is impossible for Defendant to critique the amount. One does not get to circumvent this process by  
including the fees as part of the principal balance.

1 **II. AWARDING TENS OF THOUSANDS IN ATTORNEYS' FEES WOULD HAVE A**  
2 **"CHILLING EFFECT" ON A DEFENDANT TO VOLUNTARILY PAY THE**  
3 **PRINCIPAL AMOUNTS OWED.**

4 It is undisputed that assessments and late fees sought in the complaint, separated from the  
5 unawarded attorneys' fees, totaled less than \$4,000.00. According to the ledger (a copy of which is  
6 attached to Defendant's objection to Plaintiff's proposed form of judgment), assessments since  
7 September 2011 (the last time there was a zero balance) through the end of 2016 were \$2,898.00.<sup>1</sup>  
8 Late fees for the same period would be \$945.00.<sup>2</sup> However, this amount assumes that Plaintiff was  
9 entitled to sue and foreclose for six years of assessments. Since Plaintiff's foreclosure claim only  
10 covers the last three years, the amount of assessments not time-barred total about half of these  
11 amounts. Since Plaintiff previously sued and obtained a judgment for all assessments and late fees  
12 through August 1, 2013, the "new" amounts sought in this case totaled approximately \$2,440.00.<sup>3</sup>

13 Under any calculation, the true "principal sum" (*i.e.*, excluding the line-item attorneys' fees  
14 that Plaintiff has improperly included in its principal), is substantially less than Defendant's  
15 \$5,000.00 payment in April 2017. Although Plaintiff suggests a nefarious motive in tendering  
16 payment of all past due assessments and late fees, the reason for bringing his assessments current is  
17 irrelevant. However, Defendant has made no secret that his intention was to avoid losing his home  
18 by bringing the balance of assessments to zero and narrowing the issues before the Court.  
19 Plaintiff's aspersions aside, there is nothing unlawful or improper in paying an undisputed amount  
20 that one owes and thus narrowing the amounts at issue in this case exclusively to unadjudicated  
21 attorneys' fees and costs.

22 Plaintiff's counsel contends it incurred more than \$12,000.00 of the \$20,000.00 sought after  
23 Defendant tendered his \$5,000.00 payment. This \$12,000.00 was incurred litigating a novel issue  
24 in Arizona: whether an association is entitled to continue to seek to foreclose where the defendant

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25 <sup>1</sup> 63 months of assessments at a rate of \$46 per month.

26 <sup>2</sup> \$15 for 63 months.

<sup>3</sup> 40 months of \$46 per month of assessments and \$15.00 of late fees.

1 has tendered payment, in full, of all past due assessments. Notably, there appears to be just one  
2 published case nationwide on this issue. That case, *Huntington Continental Townhouse Ass'n,*  
3 *Inc. v. Miner*,<sup>4</sup> supports Defendant's position and held that once an owner made a payment  
4 bringing the balance below the statutory threshold, the association could not continue to pursue  
5 the foreclosure.<sup>5</sup> Defendant, unlike the California defendant in *Miner*, did not simply bring the  
6 balance below the statutory threshold; he brought the balance to zero.

7 Arizona courts recognize that fees should not be awarded when imposing them would have  
8 a "chilling effect" on a party's ability to determine their rights.<sup>6</sup> In *Nickerson*, also a case  
9 involving the enforcement of servitudes, the court upheld the trial court denying fees:

10 Given the close nature of this case and the unusual nature of the servitudes,  
11 imposition of fees would have a chilling effect on future litigation to determine  
rights as to servitudes.<sup>7</sup>

12 Although Plaintiff's counsel maintains that making the same argument that was successful  
13 in *Miner* is somehow sanctionable (apparently because it is contrary to their own arguments),  
14 Plaintiff's counsel's hubris does not make this novel question a matter of black letter law in  
15 Arizona. Defendant should not be penalized in an amount eight to ten times the unpaid assessments  
16 and late fees that they voluntarily paid months ago simply because the Court ultimately rejected  
17 their position on this matter of undecided law in Arizona and ruled that Plaintiff was entitled to  
18 continue to seek foreclosure solely over unadjudicated attorneys' fees and costs. Had Defendant  
19 known that asserting a case directly on point would lead to a potential foreclosure judgment 10x  
20 the amount left owed, he likely would have figured out a way to pay off whatever number  
21

22  
23 <sup>4</sup> 230 Cal. App. 4<sup>th</sup> 590 (Cal. App. 4<sup>th</sup> Dist. Div. 3 2014).

24 <sup>5</sup> *Id.* at 606-607.

25 <sup>6</sup> *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 321, 265 P.3d 1108, 1120  
(App. 2011); see e.g., *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350, 687  
P.2d 354, 358 (1984).

26 <sup>7</sup> *Nickerson*, 228 Ariz. at 321, 265 P.3d at 1120.

1 Plaintiff's counsel came up with at that time and called it a day. This "choice" presents a textbook  
2 example of what a "chilling effect" looks like.

3 It probably would not have mattered anyway. Despite Plaintiff's witness testifying that the  
4 HOA prefers settlement over litigation, we know that this statement could not be further from the  
5 truth. Once Defendant paid the \$5,000, Plaintiff's counsel never called about resolving what  
6 appeared to be a small balance. Why would it? Settling prevents Plaintiff's counsel from  
7 continuing to cash in at Defendant's expense.

8 **III. THE FEES SOUGHT ARE UNREASONABLE AND CLEARLY EXCESSIVE.**

9 In "determining what is a reasonable fee, the trial judge can draw upon [her] own  
10 knowledge of the case and upon [her] own expertise."<sup>8</sup> The trial court can draw on [her]  
11 knowledge as to the time it should take to complete a task.<sup>9</sup> The relevant factors to consider in  
12 determining reasonableness include:

- 13 (1) The qualities of the advocate: his ability, his training, education,  
14 experience, professional standing and skill;
- 15 (2) The character of the work to be done: its difficulty, its intricacy, its  
16 importance, time and skill required, the responsibility imposed and the  
17 prominence and character of the parties where they affect the importance of  
18 the litigation;
- 19 (3) The work actually performed by the lawyer: the skill, time and attention  
20 given to the work;
- 21 (4) The result: whether the attorney was successful and what benefits were derived.<sup>10</sup>

22 For purposes of understanding the unreasonableness and excessiveness of the attorneys'  
23 fees sought in this case, it is perhaps beneficial to consider Plaintiff's attorneys' fees into three

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24 <sup>8</sup> *Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978).

25 <sup>9</sup> *Id.*

26 <sup>10</sup> *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187, 673 P.2d 931, 935 (App. 1983).

1 categories: (a) pre-suit fees; (b) fees between filing the complaint and Defendant's unconditional  
2 tender of \$5,000.00; and (c) fees post-tender and through the date of Plaintiff's fee application.

3 The Court can easily dispense with the first category. Plaintiff has not bothered to offer any  
4 evidence, either in a fee application or at the default hearing, as to the reasonableness of those  
5 fees. We have no idea what Plaintiff's counsel did to incur more than \$3,500.00. Absent such  
6 evidence, any fee award and final judgment cannot include these amounts, either as part of the  
7 "principal sum" or as a separate award of fees. Did Plaintiff's counsel send a letter? Ten? We  
8 simply have no way of knowing. To the extent these fees were previously reduced to a Justice  
9 Court judgment, something we do not know because Plaintiff has not bothered to provide any  
10 information concerning these fees, Plaintiff cannot double dip and get these fees awarded a second  
11 time.

12 The second category of fees totals \$4,190.00. As an initial matter, Plaintiff's math in the  
13 original fee application filed March 29, 2016 does not add up. The first page of Exhibit "A"  
14 details five professionals billing a total of \$2,090.00 and then a list of flat rate charges totaling  
15 \$2,100.00. It is these two amounts that add up to \$4,190.00. However, the History Bill, which  
16 includes all of these charges, reflects a total of just \$2,485.00.

17 Although Plaintiff's counsel does not explain the \$1,705.00 difference in the amount being  
18 sought, it appears to be flat fee and "estimated" charges for future tasks that have not been  
19 performed. These include entries "Mandatory Writ of Special Execution and related documents  
20 judgment information sheet," "Prepare and draft Judgment Information sheet," and "Preparation  
21 for and attendance at default judgment hearing (estimated)." We know that these entries were not  
22 for tasks actually performed because the original fee application was dated March 29, 2017 yet the  
23 dates for these tasks was "4/17-5/17." Defendant has found no authority for the proposition that an  
24 attorney can request fees for future events they have not actually performed. It also appears that  
25  
26

1 the time for these unperformed tasks was improperly block-billed at 2.6 hours.<sup>11</sup> The Court should  
2 reduce any fee award by the \$1,705.00 for the future and estimated tasks.

3 A substantial amount of time was spent dealing with the Internal Revenue Service and the  
4 State of Arizona. Plaintiff's counsel incurred hundreds of dollars in communications with the IRS  
5 and Arizona. [see time entries on 6/17/2016; 6/27/2016; 7/07/2016; 7/11/2016; 7/28/2016;  
6 7/29/2016; 8/15/2016; 8/22/2016; 9/08/2016; and 10/05/2016] This is an inordinate amount of  
7 time to bill since the IRS proposed a disclaimer of interest on 6/17/2016 and the State of Arizona  
8 proposed a disclaimer of interest on 7/07/2016. There was no need to continue to bill on these  
9 tasks.

10 Plaintiff's counsel billed at a flat rate for preparing the Complaint (\$700), the Application  
11 for Default (\$100), and Default Judgment (\$425). These amounts total \$1,225.00. Defendant does  
12 not dispute these charges. However, once the \$5,000 was paid, rather than push for default  
13 judgment and rack up tens of thousands of dollars in attorneys' fees, Plaintiff's counsel could  
14 have saved everyone (but them of course) tremendous expense and aggravation if they made a  
15 simple phone call saying, "Thanks for the \$5,000 payment. There's not much left. Here's our  
16 calculation. Can your guy make this payment and be done?" That call never came. Instead,  
17 Plaintiff racked up an enormous bill and now threatens to take Defendant's home over it unless  
18 that amount is paid – incredibly, all before this Court even weighs in to determine whether the  
19 amounts are even reasonable.

20 The third category of charges, totaling \$12,300.00, should be not awarded or substantially  
21 discounted for the reasons set forth in Section II, above. In addition, this second fee application  
22 also includes an estimated six hours of time totaling \$1,800.00 and largely consists of duplicative  
23 billing entries. For example, two separate lawyers prepared for and attended two separate  
24 hearings. [see time entries on 6/01/2017 (BWM and WWN); 6/02/2017 (BWM and WWN);

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25 <sup>11</sup> *In re Guardianship of Sleeth*, 226 Ariz. 171, 244 P.3d 1169 (App. 2010) (citing cases  
26 for proposition that block billing is improper).

1 6/19/2017 (BWM and WWN)]. Mr. Morgan is a named partner in the firm and has been  
2 collecting HOA debt for years. Mr. Nikolaus is also a partner in the firm with extensive  
3 experience. Plaintiff did not need two attorneys to litigate this matter.

4 Such duplication of efforts is excessive and unreasonable and the Court should award just  
5 for a single lawyer's time, if at all. In addition, despite that two lawyers jointly drafted a response  
6 to the motion to set aside the default (a third lawyer (SCR) who otherwise had no involvement in  
7 the case was also enlisted and drafted a pre-hearing memorandum on largely the identical issues,  
8 billing a total \$2,370.00 to do so). This amount should be rejected as well.

9 **CONCLUSION**

10 Plaintiff's serial fee applications detail more than \$16,000.00 in fees. When added to the  
11 nearly \$4,000 that it seeks for line-item entries, Plaintiff's attorneys' fees in this case total  
12 \$20,000.00. There is no telling what Plaintiff will seek in another expected supplemental fee  
13 application. For the reasons set forth above, the Court should award attorneys' fees in an amount  
14 not to exceed \$4,000.00 and, for the reasons set forth above and in Defendant's objection to the  
15 proposed form of judgment \$0 in principal.

16 DATED this 3rd day of July 2017.

17 **DESSAULES LAW GROUP**

18 By: /s/ Jonathan A. Dessales

19 Jonathan A. Dessales

20 Jacob A. Kubert

21 *Attorneys for Defendant*

1 COPY filed electronically with  
2 the Clerk of the Court  
3 this 3rd day of July, 2017

4 COURTESY COPY hand-delivered  
5 this 3<sup>rd</sup> day of July, 2017 to:

6 Honorable Commissioner Margaret Benny  
7 Southeast Facility-3C  
8 222 E. Javelina Ave.  
9 Mesa, AZ. 85210-6234

10 COPY of the foregoing mailed and e-mailed  
11 this 3rd day of July 2017, to:

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/s/ Hilary Narveson