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10 *Attorneys for Plaintiff*

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

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

16 Plaintiff,

17 vs.

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

20 Defendants.

Case No. CV2016-094391

REPLY IN SUPPORT OF PLAINTIFF'S  
APPLICATION FOR ATTORNEY FEES  
AND COSTS

(Oral Argument Requested)

21 Plaintiff, Laveen Meadows Homeowners' Association, Inc. (the "Association"), by  
22 and through undersigned counsel, hereby submits its Reply in Support of its earlier filed  
23 Application for Attorney Fees and Supplemental Application for Attorney Fees. The  
24 Association's claim for attorney fees is based in contract, and pursuant to Arizona law,  
25 the Association is entitled to an award because it is the prevailing party. In addition, the  
26 amount of fees is reasonable considering the facts and circumstances of this case, which  
included an oral argument, a trial, and numerous filings and responses by the parties.

1           **I. FEES INCLUDED AS PRINCIPAL ARE PROPER.**

2           As discussed at the damages hearing, the amounts included in the principal  
3 complaint are included pursuant to the terms of the Declaration, as well as the Arizona  
4 statute. First, the Declaration states: "There is hereby created and established a lien  
5 against each Lot which shall secure payment of all present and future Assessments  
6 assessed or levied against such Lot or the Owner thereof (together with any present or  
7 future charges, fines, penalties or other amounts levied against such Lot or the Owner  
8 thereof pursuant to this Declaration or any of the other Property Documents)." **Exhibit A,**  
9 Declaration, Section 8.3. In addition, under Arizona law, the Association has a lien for  
10 "assessments, for charges for late payment of those assessments, for reasonable collection  
11 fees and for reasonable attorney fees and costs incurred with respect to those assessments  
12 . . ." A.R.S. § 33-1807(A). All amounts included in the principal balance fall into the  
13 categories listed both under the Declaration and Arizona statute as secured charges.

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17           Defendant argues that attorney fees are not properly included in the principal  
18 portion of the judgment, though his support for such an argument lacks legal foundation.  
19 The only case mentioned (not cited), by Defendant, *China Doll*, requires that in litigation  
20 where the prevailing party has a basis for an award of attorney fees, the party seeking  
21 fees must present evidence that its attorney billing rate and the time spent are both  
22 reasonable. 138 Ariz. 183, 673 P.2d 927 (App. 1969). The *China Doll* court, however,  
23 only addressed fees incurred in litigation. *Id.*, 138 Ariz. at 186-87, 673 P.2d at 930-31  
24 ("We are concerned only with determining reasonable attorneys' fees in commercial  
25 litigation."). As a result, the Plaintiff, which incurred significant fees prior to litigation  
26

1 has relied on the language of its Declaration, as well as the Arizona statute, and thus  
2 included those pre-litigation amounts as principal. While Plaintiff remains willing to  
3 submit, and in some cases, resubmit, attorney fees and costs incurred pre-litigation or in  
4 the justice court action to this Court for review, Arizona law does not require submission  
5 of pre-litigation fees. *See id.*

7 **II. PUBLIC POLICY FAVORS ENFORCEMENT OF CONTRACTUAL TERMS.**

8 Defendant argues that attorney fees should be reduced because awarding the  
9 amount of fees incurred, which were necessary to address Defendant's outrageous  
10 litigation strategy, would produce a "chilling effect" on future litigants from employing  
11 the same strategy as Defendant did here. Quite honestly, the Court should award the full  
12 amount of attorney fees if only for that reason because Defendant's counsel alone  
13 unnecessarily drove up the costs of litigation. The parties had negotiated a stipulation to  
14 judgment as far back as October 2016, which Defendant ignored. Then, after Plaintiff  
15 filed a form of default judgment, Defendant retained counsel and Defendant's counsel  
16 tendered a check for far less than the amount owed, filed an unsuccessful motion to set  
17 aside default, improperly continued to raise questions of liability leading up to the  
18 damages hearing, and filing a pre-hearing memorandum despite being told by the Court  
19 that no memorandum was to be filed. Furthermore, public policy is far more concerned  
20 with upholding valid contractual provisions than with protecting irresponsible litigants.  
21 *Cohen v. Lovitt*, 233 Ariz. 45, 47, 308 P.3d 1196, 1198 (App. 2013) ("However, our  
22 supreme court has emphasized the societal benefits arising from the freedom of parties to  
23 contract and warned that courts must therefore be 'hesitant to declare contractual  
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1 provisions invalid on public policy grounds.” (citing *1800 Ocotillo, LLC v. WLB Group,*  
2 *Inc.*, 219 Ariz. 200, ¶8, 196 P.3d 222, 224 (2008)). “[A]bsent legislation specifying that a  
3 contractual term is unenforceable, courts should rely on public policy to displace the  
4 private ordering of relationships only when that term is contrary to an otherwise  
5 identifiable public policy that clearly outweighs any interests in the term’s enforcement.”  
6 *Ocotillo*, 219 Ariz. at 202, 196 P.3d at 224.

7  
8 Pursuant to the contractual agreement between the parties, Defendants are  
9 responsible for attorney fees and costs incurred by the Association in pursuing this matter  
10 to a successful conclusion. An award of attorney fees is mandatory pursuant to *McDowell*  
11 *Mountain Ranch Community Ass'n v. Simons*, 216 Ariz. 266, 165 P.3d 667 (App. 2007).  
12 This case removes the discretionary nature of an award of attorney fees in a contractual  
13 homeowners’ association collection action.  
14

15 Arizona case law clearly supports enforcement of a contract according to its terms.  
16 The Arizona Court of Appeals in *McDowell Mountain Ranch Community Association,*  
17 *Inc. v. Simons*, 216 Ariz. 266, 271, 165 P.3d 667, 672 (App. 2007), held that when the  
18 contract so provides, a court is required to award attorney fees and costs incurred by the  
19 association when collecting unpaid amounts, unless the opposing party can show that fees  
20 incurred were “clearly excessive”, and the Court subsequently makes an express finding  
21 to that effect. Specifically, the Court of Appeals in *McDowell Mountain Ranch* further  
22 held:  
23  
24

25 “CC&Rs constitute a contract between the subdivision’s property owners as  
26 a whole and individual lot owners.” *Ahwatukee Custom Estates Mgmt.*  
*Ass’n, Inc. v. Turner*, 196 Ariz. 631, 634, 2 P.3d 1276, 1279 (App. 2000).

1       **“Unlike fees awarded under A.R.S. §12-341.01(A), the court lacks**  
2       **discretion to refuse to award fees under [a] contractual provision.”**  
3       *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121  
4       (App. 1994.). Indeed, it is well-settled in Arizona that “[c]ontracts for  
5       payment of attorneys’ fees are enforced in accordance with the terms of the  
6       contract.” *Heritage Heights Home Owners Ass’n. v. Esser*, 115 Ariz. 330,  
7       333, 565 P.2d 207, 210 (App. 1977) (quoting 25 C.J.S. Damages § 50(c));  
8       see also A.R.S. §12-341.01(A) (2003) (“This section shall in no manner be  
9       construed as altering, prohibiting or restricting present or future contracts or  
10       statutes that may provide for attorney fees.”); *Sweis v. Chatwin*, 120 Ariz.  
11       249, 252, 585 P.2d 269, 272 (App. 1978) (“[I]t is our opinion that [A.R.S.  
12       §12-341.01] is inapplicable to the litigation here involved, inasmuch as  
13       the parties have provided in their contract the conditions under which  
14       attorney’s fees may be recovered.”). (Emphasis added).

15  
16       In *Heritage Heights*, the association filed a complaint against a home owner  
17       to enforce a restriction in the subdivision deed. *Id.* at 332, 565 P.2d at 209.  
18       The trial court denied the association’s request for injunctive relief and its  
19       request for attorney’s fees. *Id.* We held that the trial court erred by not . . .  
20       . [awarding attorney fees]. Accordingly, we stated: “[R]ecovery of all  
21       costs and attorney’s fees, including those on appeal, must therefore be  
22       granted to the Association.” *Id.* at 334, 565, P.2d at 211. (Emphasis  
23       added.)

24       The case law set forth above makes clear that this Court has no discretion to refuse  
25       or deny an award of attorney fees. The limited discretion otherwise available to a trial  
26       court arises only with respect to attorney fee requests based solely upon A.R.S. §12-  
27       341.01. *Id.* As more fully stated by the Court in *Sweis v. Chatwin*, 120 Ariz. 249, 252,  
28       585 P.2d 269, 272 (App. 1978):

29       While it is true that A.R.S. §12-341.01 now gives the trial court the  
30       discretion to award attorney’s fees to the successful party in contested  
31       actions arising out of contract, it is our opinion that **the statute is**  
32       **inapplicable to the litigation here involved, inasmuch as the parties**  
33       **have provided in their contract the conditions under which attorney’s**  
34       **fees may be recovered. Section 12-341.01 A, in plain and unambiguous**  
35       **language provides that this statute “shall in no manner be construed as**  
36       **altering, prohibiting or restricting present or future contracts . . . that**

1       **may provide for attorney's fees."** (Emphasis added). If §12-341.01 were  
2 to be held applicable to this litigation, it would in effect cancel the  
3 unqualified contractual right to recover attorney's fees given to the  
4 successful party by their agreement, and substitute in its place the purely  
5 discretionary or permissive right given by statute. **This would clearly be  
6 an alteration of the agreement of the parties and for that reason, we  
7 find that §12-341.01 is not applicable here.** (Emphasis, part original, part  
8 added.)

9       The above-cited case law makes it clear that when the CC&R's requires an award  
10 of attorney fees, Courts are required to follow the terms of the contract with respect to  
11 making such an award.

12       **III. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE FEES  
13 REQUESTED BY THE ASSOCIATION AS THE PREVAILING PARTY WERE  
14 REASONABLE.**

15       Plaintiff has submitted its affidavits as required by *China Doll*. Defendant,  
16 however, has failed to establish that Plaintiff's fees are unreasonable because they have  
17 not submitted an opposing affidavit as required by *China Doll*. 138 Ariz. 183, 188, 673  
18 P.2d 927, 933 (App. 1969) (" . . . upon the presentation of an opposing affidavit setting  
19 forth reasons why the hourly billing rate is unreasonable, the court may utilize a lesser  
20 rate."). Furthermore, "where a party has accomplished the result sought in litigation, fees  
21 should for time spent even on unsuccessful legal theories." *Id.* 138 Ariz. at 189, 673 P.2d  
22 at 933. Here, Plaintiff has prevailed at every step of litigation, and Defendant has failed to  
23 provide even the threshold requirement of an affidavit to support his arguments that  
24 Plaintiff's counsel's fees are excessive.

25       Even upon review of the fees incurred by Plaintiff, the fees in this case are  
26 reasonable because of all that has occurred since the case was filed, including the

1 Stipulation to Judgment that was negotiated and ignored by Defendant, Defendant's  
2 unsuccessful motion to set aside default, Defendant's improper citation of non-  
3 precedential cases, oral argument on the Defendant's motion to set aside, Defendant's  
4 unnecessary pre-hearing memorandum, and several filings following the damages  
5 hearing. The time spent by Brian Morgan, Will Nikolaus, and Samuel Richardson was  
6 necessary to protect the Association's interests in the foreclosure remedy in this case, and  
7 in future cases.

8  
9 Although Defendant's minimizes the nature of this lawsuit and the issues raised in  
10 his objection, the implications of Defendant's approach is no less than an existential  
11 threat to planned communities and condominiums statewide. As a result, all the time  
12 spent on this case was necessary to ensure the viability of Plaintiff's lien, but also of  
13 Plaintiff's continued existence because if Plaintiff's ability to foreclose is eviscerated as  
14 suggested by Defendant's counsel, so too are planned communities.

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16  
17 **III. CONCLUSION.**

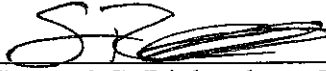
18 As established by the foregoing, the contractual and statutory authority relied upon  
19 by the Plaintiff in seeking an award of attorney fees provide that an award of attorney  
20 fees is mandatory and that the contractual provisions of the Declaration requiring  
21 Defendants to pay the Plaintiff's attorney fees should be enforced. Additionally, to date  
22 the Association prevailed on all claims brought in this case. Accordingly, the  
23 Association is entitled to recover attorney fees for all action taken, including this reply.

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///

1 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of July, 2017.

2 MAXWELL & MORGAN, P.C.

3 

4 Samuel C. Richardson, Esq.  
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6 **ORIGINAL** of the foregoing submitted  
7 for e-filing this 14 day of July, 2017, to:

8 The Clerk of the Court

9 **COPY** of the foregoing delivered  
10 this 14 day of July, 2017, to:

11 Hon. Margaret Benny  
12 Southeast Facility 3C  
13 222 E. Javelina Ave.  
Mesa, AZ 85210

14 **COPY** of the foregoing mailed  
15 this 14 day of July, 2017 to:

16 Jonathan Dessauls, Esq.  
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19 