

# **EXHIBIT A**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAVEEN MEADOWS HOMEOWNERS  
ASSOCIATION,

Plaintiff,

vs.

CARLOS MEJIA, ET AL,

Defendant.

No. CV2016-094391

Phoenix, Arizona

April 17, 2017

9:09 a.m.

BEFORE COMMISSIONER MARGARET BENNY

TRANSCRIPT OF PROCEEDINGS

Default Hearing

Proceedings recorded by electronic sound recording; transcript produced by AVTranz, an eScribers, LLC company.

KAREN RAILE  
Transcriptionist



I N D E X

April 17, 2017

PLAINTIFF'S WITNESSES      DIRECT   CROSS   REDIRECT   RECROSS   VD

None

DEFENDANT'S WITNESSES      DIRECT   CROSS   REDIRECT   RECROSS   VD

None

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APPEARANCES

April 17, 2017

Judge: Margaret Benny

For the Plaintiff:

William Nikolaus

Witnesses:

None

For the Defendant:

Jake Kubert

Witnesses:

None



Phoenix, Arizona

April 17, 2017

(Commissioner Margaret Benny Presiding)

DEFAULT HEARING:

THE COURT: Okay. Let me go ahead, and I'll go ahead and call your case, then. And Mr. Nikolaus is here for Laveen Meadows.

MR. NIKOLAUS: Good morning, Your Honor.

THE COURT: Good morning. And this is number two on the calendar, CV2016-094391, Laveen Meadows Homeowners Association versus Carlos Mejia, Lexington National Insurance Corporation, and U.S. Immigration Bonds and Insurance Services Incorporated.

This says it's time for a default hearing, so let's go ahead and have you both stand and raise your right hands, I'm going to swear you in.

PARTIES SWORN

THE COURT: Thank you. Please be seated. Let me go ahead and pull this case up on the system.

Let's go ahead and have you file in a notice of appearance, Mr. Kubert. And how do I spell Kubert?

MR. KUBERT: It's spelled, Judge, K-U-B-E-R-T. And my office filed on April 14th, so it would be Friday. I'm not sure if it's been received yet.

THE COURT: Okay. So it's already in the file?



1 MR. KUBERT: Yes.

2 THE COURT: Okay. Then we won't have you fill one  
3 out then.

4 So we're here today for a default hearing. Both  
5 Mr. Nikolaus and Mr. Kubert have been sworn in. Mr. Mejia was  
6 personally served on May the 11th, 2016; Lexington National  
7 Insurance Corporation was served personally through their agent  
8 in Maryland on May 13th, 2016; U.S. Immigration Bonds and  
9 Insurance Services Incorporated was served in Florida  
10 personally on May 12th, 2016, through its president.

11 The U.S. Department of Treasury and the Internal  
12 Revenue Service in the seat of Arizona have already been  
13 dismissed.

14 There was an application for the entry of default  
15 filed on December 8th, 2016, and a motion and notice for  
16 today's hearing filed jointly on March 29th, 2017.

17 Let's go ahead and start with you, Mr. Nikolaus.  
18 Anything you want to add?

19 MR. NIKOLAUS: No, Your Honor. All Defendants have  
20 been properly served and defaulted in this action. Obviously,  
21 Mr. Kubert said they -- we received it the close of business on  
22 Friday. I hadn't reviewed it, I was assigned to attend these  
23 hearings, but -- a notice of appearance and so forth.

24 But we believe that default is properly entered, just  
25 by way of the factual history. The Defendant, Mr. Mejia -- as



1 you'll notice in our fee application you probably already have  
2 reviewed, Mr. Mejia contacted our office in June of 2016,  
3 proposed a payment agreement.

4 You'll notice later in July that same year, there was  
5 a stipulated judgment proposed; and then in September, after  
6 the board meeting met on that issue, a proposed stipulation of  
7 judgment was sent to Mr. Mejia. It was never returned, and no  
8 further negotiations on that proposed stipulation; which was  
9 again, the terms exactly proposed by Mr. Mejia that were  
10 accepted by our client.

11 So he never returned the stipulation, and thereafter,  
12 as the Court's already indicated, around December 8th, an  
13 application for entering default was filed. We believe that  
14 the time for objecting and/or appearing to that default is past  
15 due, and we'd ask the Court to enter judgment today on this  
16 lien/foreclosure act.

17 And I'm only addressing Mr. Mejia, Your Honor. The  
18 other Defendants -- those who have stipulated or dismissed out  
19 already, already (indiscernible). The -- that may be all,  
20 sorry.

21 And then the other Defendants have been properly  
22 defaulted as well.

23 THE COURT: Thank you. Mr. Kubert, anything you want  
24 to say with regards to Mr. Mejia?

25 MR. KUBERT: Yes, Judge. I realize that we filed



1 this on Friday, so I'm not sure -- right before a holiday  
2 weekend, so I'm not positive on how (indiscernible) was able to  
3 appreciate what was (indiscernible) --

4 THE COURT: Oh, I can let you even know, without any  
5 sort of holiday, we won't see it for a few days after --

6 MR. KUBERT: Okay. The action, it's a straight  
7 lien/foreclosure case. There's no monetary damages. The  
8 predicate for the lien/foreclosure has been paid in full and  
9 overpaid to ensure that Mr. Mejia would not lose his home.  
10 He's a Spanish speaker, didn't realize that we're having this  
11 action.

12 I understand it's been some time since he's been  
13 served, and in fact, he may have had communication with  
14 Plaintiff's counsel. Immediately upon receiving the motion to  
15 enter default judgment, he retained our office.

16 We immediately counseled him to pay what was due to  
17 eradicate the predicate for foreclosing on the lien. He  
18 paid -- he overpaid.

19 There's nothing attached to the HOA's complaint to  
20 establish where they arrived at the amounts that are claimed to  
21 be due. So our understanding that some of these amounts may  
22 have been in fact rolled over from a prior judgment that was  
23 entered against him that are completely improper.

24 The law provides -- 18 -- 33-1807 provides that in  
25 order to establish a lien/foreclosure action, there needs to be



1 owed \$1,200 at the time of the judgment in order to obtain such  
2 a judgment, a lien/foreclosure judgment. There is no \$1,200  
3 balance, he does not owe anything in assessments as we're  
4 sitting here today.

5 The association is not entitled to foreclose on  
6 whatever other charges that they have added to their complaint  
7 that there is absolutely no evidence for, no proof, no award  
8 from the court that says they're entitled to these additional  
9 charges. And 33-1807 makes it perfectly clear that no fewer  
10 than four different times does it provide that you cannot  
11 create a basis for lien/foreclosure based on amounts that are  
12 not assessments, those amounts that are actually owed to the  
13 HOA as monthly dues.

14 The HOAs usually have -- they usually put a provision  
15 in their CCRs that says anything that's ever owed to an  
16 association: Charges, interest, fines, violations, it all gets  
17 thrown into the gamut of being called assessments, and that's  
18 how HOAs are able to inflate the amount of assessments that  
19 arose for purposes of these types of proceedings.

20 The clear language in the statute makes it clear that  
21 the Court is supposed to strip off all of those extra charges  
22 that are, you know, not a monthly assessment due in order to  
23 foreclose upon it. Again, that amount is completely paid.

24 I think the claimed amount of the claim is  
25 approximately \$8,300. Mr. Mejia paid \$5,000. The monthly



1 assessments -- one second, Your Honor.

2 The monthly assessments, from our understanding, it  
3 hasn't changed for at least six years. And while he wasn't  
4 required to pay off the six years, he just paid it out of  
5 abundance of question to avoid any sort of losing his home.

6 He has his defense, a meritorious defense. Under  
7 Rule 60(c), the Court cannot enter such a foreclosure judgment  
8 under 33-1807. So the basis for seeking -- setting aside the  
9 entry of default now is because any judgment would be void,  
10 which is a clear ground for setting aside a judgment  
11 on -- under Rule 60(c).

12 As this Court is aware, Arizona favors resolutions on  
13 the merits, and --

14 THE COURT: Did you file a motion to assess? I  
15 did --

16 MR. KUBERT: We did. It's -- we filed it on the  
17 14th, we filed a notice of appearance, we filed a motion to set  
18 aside the entry of default, we filed an answer, and we also  
19 served this packet with Mr. Mejia's \$5,000 payment.

20 I have it -- I only brought myself one copy, but I  
21 can show the Court the exhibit if --

22 THE COURT: No. What I'm going to do is, I'm going  
23 to go ahead and reset it, because if you did file the motion,  
24 then the other side has the chance to respond.

25 So what I'll do is, even with the default in place,



1 the Defendant has the right to contest the amount of damages.  
2 So I'll just set this as a contested hearing on the amount of  
3 damages.

4 Because you are contesting that, true?

5 MR. KUBERT: Well --

6 THE COURT: The amount owed?

7 MR. KUBERT: In a way we are, but --

8 THE COURT: Okay --

9 MR. KUBERT: -- did not establish a claim for money  
10 damages, so --

11 THE COURT: Okay. So if they're contesting damages,  
12 I'm going to set a hearing in regards to that, and at the same  
13 time, I'll address your motion to assess at the default.

14 Let's see. So let me take a look at response times,  
15 and then set a hearing after that. Let me see about May 5th,  
16 unless you want a time for reply.

17 Okay. So let me look the week of May 15th, then.

18 (Pause)

19 THE COURT: Okay. I could set it later in the  
20 morning on May 15th after the default hearings, or I could set  
21 it on Tuesday, May 16th. Well, I've got a 10:30. I could set  
22 it for 9:00, go from 9:00 to 10:30, if you choose. But right  
23 now the 15th is clear. We could try setting it for 10:30 and  
24 go from 10:30 to 12:00, if you want the 15th.

25 MR. NIKOLAUS: 16th works for me, Your Honor.



1 MR. KUBERT: Yeah. That's fine, Your Honor.

2 THE COURT: Okay. So we'll do May 16th at 9:00 a.m.

3 So it will be a contested hearing regarding damages,  
4 motion to assess by default. And that gives both of you the  
5 time to respond and reply.

6 Well, I -- the 15th would be the day your reply would  
7 be due, that wouldn't be good for Mr. Nikolaus to be able to  
8 prepare. I can set it out a little later, or if you're okay,  
9 we could have your reply due on May 12th so he has at least the  
10 time to read it.

11 MR. NIKOLAUS: Well, could we set it out maybe later  
12 that week --

13 THE COURT: I could set it for the 19th --

14 MR. NIKOLAUS: -- or even -- just the week of -- not  
15 a long delay, but --

16 THE COURT: I could set it for Friday, the 19th.

17 MR. NIKOLAUS: I'm okay with that.

18 THE COURT: I could set it for May 19th if --

19 MR. NIKOLAUS: Mr. Kubert and I -- I mean, we're okay  
20 if the Court's okay. I know it's getting into the summer  
21 months, even postpone it to the end of -- early June, maybe to  
22 try to reach some resolution between ourselves without --

23 THE COURT: Okay. We have time.

24 MR. NIKOLAUS: I know -- yeah. There may have  
25 been --



1 THE COURT: I can bring you in June the 2nd, which is  
2 a Friday, or I could bring you in the following week, June  
3 the 5th through June the 9th. After that, I can't set anything  
4 because we get into judicial conference and vacations.

5 MR. NIKOLAUS: How about June 2nd, if that's all  
6 right.

7 THE COURT: Is that okay with you?

8 MR. NIKOLAUS: That's Friday, Your Honor.

9 THE COURT: Yes, Friday.

10 MR. KUBERT: Yes, that will work.

11 THE COURT: Okay. I usually am supposed to reserve  
12 9:00 a.m. for evictions and forcible detainers, but I can set  
13 it for 10:00 and go 10:00 to 11:00.

14 MR. NIKOLAUS: I'm fine with that.

15 THE COURT: Okay. So Friday, June 2nd, 10:00 to  
16 11:00.

17 Thank you, all. See you then.

18 (Proceedings concluded at 9:24 a.m.)

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## CERTIFICATE

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I, Karen Raile, a court approved transcriber, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

/s/

KAREN RAILE  
Transcriber

August 23, 2017



# **EXHIBIT B**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAVEEN MEADOWS HOMEOWNERS  
ASSOCIATION,

Plaintiff,

vs.

CARLOS MEJIA, ET AL,

Defendant.

No. CV2016-094391

Phoenix, Arizona

June 2, 2017

10:26 a.m.

BEFORE COMMISSIONER MARGARET BENNY

TRANSCRIPT OF PROCEEDINGS

Default Hearing

Proceedings recorded by electronic sound recording; transcript produced by AVTranz, an eScribers, LLC company.

KAREN RAILE  
Transcriptionist



I N D E XJune 2, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
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None

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
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None

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APPEARANCES

June 2, 2017

Judge: Margaret Benny

For the Plaintiff:

Brian Morgan

William Nikolaus

Witnesses:

None

For the Defendant:

Jacob Kubert

Witnesses:

None



Phoenix, Arizona

June 2, 2017

(Commissioner Margaret Benny Presiding)

DEFAULT HEARING:

THE COURT: Okay. We're here today for Laveen Meadows Homeowners Association versus Carlos Mejia. We're here today regarding the motion to set aside the default, the reply -- or the response and the reply, and the motion to strike the response and the reply; as well as any hearing regarding contested damages.

Let's go ahead and start with parties announcing, please.

MR. MORGAN: Good morning, Your Honor. Brian Morgan on behalf of Laveen Meadows

THE COURT: Thank you.

MR. KUBERT: Good morning, Your Honor. Jacob Kubert on behalf of Defendant Carlos Mejia.

MR. NIKOLAUS: Attorney William Nikolaus, Your Honor, here with Brian Morgan on -- for Laveen Meadows. And with us today, we have Mohammed al Sayed (phonetic), who is the board member for Laveen Meadows.

THE COURT: Okay. Thank you.

Let's go ahead and start with the oral arguments regarding the two motions. Let's start with the motion to set aside default.



1 MR. MORGAN: Your Honor, if -- I'm sorry, I don't  
2 mean to interrupt. I think it might be appropriate to first  
3 rule on the motion to strike, because that will have impact on  
4 the way the motion to set aside is addressed, if that's okay.

5 THE COURT: Okay. Let me just --

6 (Pause)

7 THE COURT: So you don't want to be heard on the  
8 motion to strike?

9 MR. MORGAN: No, we do want to be heard, but --

10 THE COURT: Okay. We'll go -- do you have any  
11 objection?

12 MR. KUBERT: No objection.

13 THE COURT: Okay. Go ahead.

14 MR. MORGAN: Okay. Do you want me at the podium?  
15 Here at the desk? What's your preference?

16 THE COURT: Either one is fine, but if you're at the  
17 desk, if you'll just be seated because the microphone picks you  
18 up better.

19 MR. MORGAN: Okay.

20 THE COURT: But if you prefer to stand, the podium is  
21 good.

22 MR. MORGAN: I'll try the podium. If I need to  
23 reference something else, I can go back, if that's okay.

24 THE COURT: No. That's fine.

25 MR. MORGAN: Thank you, Your Honor.



1           So this really should be a fairly quick matter as far  
2 as the motion to strike. We're simply asking the Court to  
3 grant our motion, and by so doing, confirm for the record that  
4 this Court will not rely upon authority in the other superior  
5 court cases that were referenced in Defendant's briefing.

6           So that's it.

7           THE COURT: Okay. Thank you.

8           MR. KUBERT: Your Honor, my burden here today is,  
9 Rule 55(c) has set aside a default that burden is to establish  
10 good cause with that, and to establish good cause, what I'm  
11 trying to do is protect my client from losing his home. With  
12 that as a backdrop, we'd ask that the judge -- that Your Honor  
13 take judicial notice of some of these prior decisions.

14           That the judge -- Your Honor, you're saying this is a  
15 foreclosure claim. Foreclosure claims are an equitable claim  
16 under Arizona law. The Court has broad discretion to weigh  
17 certain materials to that end. And we'd ask that Your Honor  
18 could -- has plenty of discretion whether to do what the Court  
19 pleases with those other opinions where we haven't actually  
20 succeeded on this argument.

21           MR. MORGAN: And just in response to that, Your  
22 Honor, I'm a little surprised that they continue to take that  
23 approach even after the debriefing, especially in light of the  
24 fact that by doing so, they're essentially in violation of an  
25 ethical rule, which would be to also introduce to the Court the



1 contradictory opinions and positions that are out there.

2 So, I mean, if they want to continue to take that  
3 approach, I get that. But by doing so, they're violating an  
4 ethical rule.

5 THE COURT: I'm going to go ahead and grant the  
6 motion to strike, and we'll move on to the motion to set aside  
7 default.

8 Counsel, you can start.

9 MR. KUBERT: Yes, Judge.

10 Like I said, it's -- the burden should not be too  
11 high to demonstrate good cause. We believe good cause exists  
12 here. This case was about a foreclosure of a home for missed  
13 assessments.

14 The amount sought is approximately -- just a shade  
15 over \$8,000. Based on our calculations of that amount, it  
16 appears -- and the ledgers are very difficult to understand,  
17 which we would ask is another reason to set aside so we can  
18 actually litigate that issue.

19 But based on our understanding of the ledger, of the  
20 83 amount sought in the complaint, it appears that  
21 approximately \$1,900 or so constitutes unpaid assessments, late  
22 charges associated with those assessments. Mr. Mejia has paid  
23 \$5,000, which wipes out the unpaid assessments, fines, and  
24 arguably a good portion of the attorney's fees sought in this  
25 case.



1 Arizona law prohibits that the statute regarding  
2 foreclosure of assessments is clear: Anything that is not  
3 assessments is not attributable to the foreclosure until after  
4 a judgment is rendered. Once a statutory threshold of unpaid  
5 assessments falls below that amount, foreclosure is off the  
6 table.

7 A.R.S. 33-1807(a) provides the \$1,200 threshold which  
8 allows the HOA to maintain its lien foreclosure suit. Once  
9 that \$1,200 threshold -- once the amount falls below that  
10 threshold -- now, the key here is prior to entry of the  
11 judgment -- there is no more foreclosure. And that makes  
12 perfect sense, that the legislature and general public policy  
13 is not interested in watching people lose their homes when  
14 they've already paid their dues. Mr. Mejia has paid these  
15 dues.

16 The next step, Your Honor, is really for the  
17 HOA -- well, let us appear in the case; but after that, is to  
18 let the HOA file its fee app, argue over the fees. Your Honor  
19 has the gatekeeping function of determining the reasonableness  
20 of the fees, and so far we have no idea what that is. We do  
21 not have an attorney fee bill.

22 And it is at that point Your Honor is authorized to  
23 enter a judgment -- a monetary judgment, not a foreclosure  
24 judgment. Because like I said, the statute is clear, once you  
25 fall below the statutory threshold, there's case law right on



1 point.

2 I don't know if this is the proper vehicle right now  
3 to be arguing the actual law regarding 33-1807, but I would  
4 submit that, since my burden here is to establish good cause, I  
5 can't imagine another scenario that doesn't -- doesn't warrant  
6 good cause being established when frankly, there is no claim  
7 left. If there's no good cause in this case, Judge, I can't  
8 imagine there's another case where there is good cause.

9 Thank you.

10 THE COURT: Give me a moment, please.

11 (Pause)

12 THE COURT: We'll get to it, we just won't get to it  
13 now.

14 So you tendered a check of \$5,000 to the HOA. Did  
15 they accept it and cash it?

16 MR. KUBERT: I believe so. Mr. Morgan would be able  
17 to --

18 MR. MORGAN: Yes, Your Honor. I believe initially a  
19 check was submitted as a restrictive language, if my --

20 MR. NIKOLAUS: Not the 5,000. The 5,000 was --

21 MR. MORGAN: There was \$4,000 --

22 MR. NIKOLAUS: That was the stipulation --

23 MR. MORGAN: Yes, Your Honor. The 5,000 was  
24 accepted. It was not contingent upon anything, it was  
25 not -- it had no restrictive language accompanying it. And so



1 in good faith, we accept those. It -- it was submitted prior  
2 to the date of the default hearing.

3 So certainly, we're going to accept that check. If  
4 we don't, I know Defendant's counsel has argued in the past  
5 that by returning a check, we're acting in bad faith. So I  
6 don't see any reason why an unrestricted check should not be  
7 accepted.

8 MR. KUBERT: And if I may, Your Honor, the check was  
9 submitted with the Association's exhibits for evidentiary  
10 hearing as Exhibit G. So it is in the record, and that's dated  
11 May 26th.

12 THE COURT: With the way you interpret 33-1807(a),  
13 you're basically saying you have until the time of judgment to  
14 pay it, or there can be no foreclosure. But basically, you're  
15 causing the other side to incur significant costs and  
16 attorney's fees as a result of that.

17 MR. KUBERT: That's absolutely true, Judge. Fees are  
18 incurred up until the time that the amount is paid below the  
19 threshold. That is absolute concern that the court in the  
20 case, Huntington Continental Townhomes Association, Inc., v.  
21 Minor (phonetic), it's a California appellate division case  
22 from 2014, directly on point on this issue; HOA foreclosure,  
23 they had almost the identical statute as 33-1807. The court  
24 confronted that head-on, and -- I mean, I can read from a  
25 previous brief. I don't know if the Court's interested in



1 that.

2 But the counter to that position, I'll just say, is  
3 that -- to say that the Association can continue its  
4 foreclosure, even if it's paid, would prevent the homeowner  
5 from avoiding foreclosure the day after the complaint is filed.

6 So there's a dispute what's owed, HOA rushes to -- I  
7 don't want to allege that they rushed or anything like that,  
8 because this is clearly a case where they didn't rush -- HOA  
9 could file a foreclosure complaint. And it's going  
10 to -- foreclosure is going to occur regardless -- the homeowner  
11 has no chance to pay down the assessments the day after the  
12 complaint is filed.

13 So that's the counter position where -- I completely  
14 appreciate that, that once it's (indiscernible) you're leaving  
15 the HOA in the lurch.

16 That argument was addressed completely in the  
17 California case that I just cited, and I would implore the  
18 Court to let us -- let the parties brief this to the Court  
19 fully so the Court can appreciate both of those arguments. I  
20 don't think there's any prejudice to the HOA. They've been  
21 paid a significant portion of what's been owed. All that's  
22 really left is the attorney's fees.

23 We could argue the law in the case for the judge, and  
24 there should be no issue. That should be good cause enough to  
25 allow the Court to hear the arguments on that point.



1 THE COURT: Between the last hearing and now, did you  
2 make the request for the ledger to be able to review it all?

3 MR. KUBERT: I do not believe so, Judge.

4 THE COURT: Why didn't you do that? That's one of  
5 your main issues.

6 MR. KUBERT: Well, like I mentioned, I don't think  
7 it's pertinent to setting aside the default. I think it's -- I  
8 didn't think that it was the time to litigate the merits of the  
9 case before I had had an opportunity to file an answer and  
10 understand the positions, understand the ledger, conduct  
11 discovery into the ledger, serve -- survey interrogatories, any  
12 of that until we were actually in the case.

13 So there was thinking on that that it wasn't the  
14 proper time.

15 THE COURT: Okay. Anything else you want to raise  
16 as -- in your argument for your motion to set aside default?

17 MR. KUBERT: One other thing. I mean, it appears  
18 that all that's left are attorney's fees. And Arizona law is  
19 very clear about attorney's fees when it's been a fee-shifting  
20 statute such as that, is that the Court is the gatekeeper of  
21 that -- of what amount is reasonable.

22 As it stands now, Mr. Mejia is being asked to pay  
23 attorney's fees with no determination on whether those amounts  
24 are reasonable. It's take the HOA's word for it that they are  
25 reasonable.



1           What's been (indiscernible) so far in the exhibits by  
2 the HOA is just a straight rundown ledger: Attorney's fees,  
3 number; attorney's fees, a number; attorney's fees, a number.  
4 We have no idea what those amounts are or what tasks were  
5 performed or if they were necessary, nothing like that that we  
6 could argue during a fee proceeding. Which is all that's  
7 really left in this matter, and the only way that that can take  
8 place is if my client is afforded some due process.

9           THE COURT: So are you looking at the affidavit in  
10 support of attorney's fees?

11          MR. KUBERT: I don't --

12          THE COURT: That was filed back on April the 3rd?

13          MR. KUBERT: I was not aware of that if that did  
14 occur.

15          MR. NIKOLAUS: Prior to the default hearing, Your  
16 Honor, that judgment back in -- the counsel was not involved  
17 yet in that case. But he -- Mr. Mejia was provided a copy of  
18 the judgment. Again, they appeared the day before the default  
19 hearing.

20          THE COURT: Okay. Thank you.

21          MR. KUBERT: So really, Your Honor, in conclusion,  
22 there's nothing foreclosed upon, and we need an opportunity  
23 to -- just to brief whether they're entitled to the judgment  
24 they're actually seeking under Arizona law. And if they are  
25 able to foreclose on just straight assessments -- I mean,



1 sorry, just straight attorney's fees, we need a determination  
2 of whether they're reasonable.

3 And it kind of ties back into the purpose of the law  
4 is that, how is one able to redeem this property if  
5 they're -- they pay off the assessments, those are written in  
6 stone. You know what your assessment dues are. But the fees,  
7 there's no determination on what -- whether those are  
8 reasonable.

9 So how does a -- how is a homeowner supposed to pay  
10 down in order to avoid the litigation? There needs to be that  
11 determination made.

12 Which is why the statute does not allow -- the  
13 statute strips down all those fees from foreclosure. More than  
14 once, it's like two or three multiple times. It says do not  
15 count these -- do not count attorney's fees, do not count  
16 attorney's fees; no late charges, do not count that in  
17 the -- they're supposed to be stripped down.

18 And I'm going to quote from the statute: "Fees,  
19 charges, late charges, monetary penalties, and interest charged  
20 pursuant to Section 33-1803," that's, you know, HOA  
21 charges, "other than charges for late payment of assessments  
22 are not enforceable as assessments under this section," which  
23 is the lien foreclosure statute.

24 THE COURT: Okay. Thank you. Anything further?

25 MR. KUBERT: No, thank you.



1 THE COURT: Okay. Thank you.

2 Mr. Morgan?

3 MR. MORGAN: Thank you, Your Honor.

4 So first off, the burden certainly is on Defendant to  
5 have the entry of default satisfied, and that burden has not  
6 been met. Counsel said that the burden is not high, it's only  
7 for good cause. That is not the burden.

8 If you look at Rule 55, the burden is very clear.  
9 They have to establish three things: They have to establish  
10 that they moved promptly to have the default or default  
11 judgment set aside. And they also have to show two things:  
12 That the failure to defend was a result of excusable neglect,  
13 and there is meritorious defense to the claims.

14 So they have to meet all three of those in order to  
15 establish relief under this statute, under the rules of civil  
16 procedure, and under the case law supporting that. And that's  
17 all briefed very well in our response.

18 That was not responded to other than to basically  
19 quote an appellate court case from the court of appeals in  
20 California, as well as two cases that were stricken by the  
21 motion earlier today.

22 Our brief is still with Arizona law, that  
23 specifically indicates this Court is not divested of  
24 jurisdiction of a foreclosure matter, or for any matter, if at  
25 the time that the lawsuit was filed, the jurisdiction was



1 there. And it's clear. In fact, there's been an admission of  
2 Defendant that at the time the lawsuit was filed, there were  
3 unpaid amounts in excess of the statutory rate.

4 So right now, focusing on just the statutory element,  
5 we already -- the burden can't be met, because they cannot  
6 establish a meritorious defense, they cannot establish the  
7 failure to defend was -- resulted excusable, and they left.

8 The fact that Mr. Mejia has language troubles, that's  
9 very well addressed in our briefing. And even look at the  
10 prompt -- the prompt -- moving promptly to have the default set  
11 aside. Mr. Mejia clearly recognized the significance of this  
12 lawsuit.

13 The day that he -- the lawsuit was served on  
14 May 11th, 2016. On May 12th, Mr. Mejia traveled to our office,  
15 a round-trip distance of about 60 miles, understanding that  
16 this was a significant issue. He requested a past statement  
17 which several days later was provided to him.

18 Five days after receiving that payoff statement,  
19 Mr. Mejia contacted our office and offered a payment agreement,  
20 acknowledging that he owed the money, and wanted to know if he  
21 could make a payment arrangement. On July 25th, Defendant was  
22 informed that that offer had been rejected.

23 So a few days later -- actually one day later, he  
24 contacted again, issuing a new payment offer to pay the entire  
25 balance as presented in the complaint, foreclosure complaint.



1 The board met on September 13th, accepted that offer; and we  
2 provided a stipulation to judgment to Mr. Mejia reflecting the  
3 terms that he had addressed in that offer.

4 So here, you see the beginning of this lawsuit,  
5 that's prompt. When you talk about responding the day after a  
6 lawsuit is filed, that's prompt. When you talk about  
7 responding days after receiving the breakdown of what is owed,  
8 that is prompt. Waiting 117 days after default had been  
9 entered to then contest the entry of default is not prompt. So  
10 they missed the first prompt.

11 Excusable neglect, the case law indicates the test is  
12 whether the acts of the party defaulted were those of a  
13 reasonably prudent person under the circumstances. So the fact  
14 that Mr. Mejia doesn't speak English as alleged, we'll -- I'm  
15 not going to contest that -- that is why our office made  
16 available Spanish speakers to him. If he didn't understand  
17 what the Spanish speakers were saying, clearly the way that he  
18 responded to the lawsuit at the outset, he understood the  
19 gravity of it.

20 A reasonable person, after receiving a stipulation of  
21 judgment, after receiving responses, would have been reached  
22 out either to us or as -- as it states in the stipulation of  
23 judgment, seek counsel. We encourage you to seek counsel, you  
24 have the right to seek counsel, and they should have done that.  
25 Nothing happened for 117 days until eventually he sought



1 counsel, the eve of the default hearing, but that's too late at  
2 this point. That's not excusable neglect.

3 And prompt number three, there is no meritorious  
4 defense to the claims. One thing that is blatantly absent from  
5 all of the briefings on behalf of Defendant is the fact that in  
6 the complaint, I believe it's paragraph 11, we talk about  
7 separate and independent bases for bringing this statute. One  
8 is under statute and one is under contract.

9 Well, even presuming, which we disagree with, but  
10 even presuming that the argument raised by Defendants is  
11 accurate, that they have up until the date the judgment is  
12 entered to just magically make this whole thing go away and  
13 there's no more lien on the property for all the attorney's  
14 fees that they forced the Plaintiff to incur, even accepting  
15 that as true, there is no reference to the fact that there is  
16 separate contractual obligations to pay these same amounts.  
17 And the contract does not make reference to that same statutory  
18 language.

19 So they lose there. But let's go back to even their  
20 argument under 33-1807, because that in and of itself is a  
21 ludicrous argument. It's nothing more than gamesmanship.

22 All that they do in that scenario is say, okay, yes,  
23 we understand the attorney's fees are Mr. Mejia's  
24 responsibility, but they're not a lien. Well, Your Honor, in a  
25 case like this, this is is poster child for this type of



1 situation.

2           The Association has been attempting to collect from  
3 Mr. Mejia for years. They obtained a money judgment, which is  
4 a cheaper method, and that paid no results. It was only once a  
5 foreclosure, the threat of losing a home was filed that  
6 Mr. Mejia understood the true gravtus of this.

7           Then at that point, he came, offered to pay -- in  
8 fact, has paid a substantial amount, which is great. The  
9 Association has absolutely no desire to foreclose on their  
10 homeowners. But when that is the only tool left to them that  
11 seems to reap results, then that's what they have to do.

12           And to strip that right away because at the time last  
13 minute, the eve before a default hearing, they come in and pay  
14 a portion, which is logically enough to pay off any unpaid  
15 assessments, to strip this Court of jurisdiction to enter a  
16 foreclosure judgment for the additional amounts of truth  
17 throughout the entire process of litigation, that's absurd.

18           Now, one of the other issues that was raised is in  
19 relation to attorney's fees, and some claim that we are the  
20 judge, jury, and arbiter of what is a reasonable attorney fee.  
21 That's not at all what is being suggested.

22           We are following what happens in every single case  
23 out there. Any contract case, any case involving a potential  
24 award or recovery of attorney's fees. We make a claim for it  
25 on behalf of the Association, and then they have one of two



1 options: They get a ledger and they say, oh, you know what? I  
2 don't understand these three charges, what does that mean? And  
3 we sit down, we talk about it, we work out an agreement; or we  
4 say, okay, we disagree on these three issues, okay. Let's take  
5 that to the judge and the judge can decide.

6 So if there was ever a question as to reasonableness  
7 of any of the fees posted on the ledger, that certainly could  
8 have been brought up, and in fact can be brought up through a  
9 China Doll affidavit, through the proper method. But simply  
10 striking a claim and divesting this court of jurisdiction  
11 because we made the claim, because the Association made the  
12 claim, that's -- it's a ludicrous result.

13 One other issue, just to highlight this, had  
14 Mr. Mejia come to us or had counsel come to us from the time  
15 they were engaged to say, hey, let's talk about these issues,  
16 let's see if we can work out the -- we understand he owes  
17 money, and we'd like to get this resolved. That is not what  
18 has happened here.

19 They have filed their objection, they want to get  
20 this set aside. We just heard from counsel that he wants to  
21 take interrogatories over a couple hundred dollars of disputed  
22 amounts on the ledger.

23 MR. KUBERT: No. I definitely don't. That's why I  
24 didn't do it when she asked.

25 MR. MORGAN: But that's what he's saying, let's open



1 this case up again, let's go back to the beginning, set aside  
2 the default, and let's start the process so we can take  
3 depositions, we can do interviews, we can send out  
4 interrogatories and discovery. It's a collection case. I  
5 mean, the issue is, how much is owed.

6 If there are specific questions, the Court is  
7 certainly capable of addressing those. That's why we have  
8 Mr. Mejia here -- I'm sorry, Mr. Mohammed, who is ready to  
9 testify as to the amount of damages so we can fully and finally  
10 resolve this matter and not drag it out longer.

11 THE COURT: Thank you. Any final words?

12 MR. KUBERT: Just a few words, Your Honor.

13 Plaintiff's counsel admits that there are other  
14 vehicles for obtaining this -- attorney's fees once the  
15 threshold is paid down below the statutory number. It's not  
16 like a homeowner pays it three-quarters of the way to  
17 litigation and the HOA is stuck with three-quarters worth of  
18 attorney's fees that they can't collect.

19 The California court addressed that very issue, said  
20 that the HOA has several other ways to collect those amounts,  
21 including maintaining another claim for the amount. And the  
22 HOA has a claim for breach of contract for those amounts. They  
23 can recover those attorney's fees that have been incurred  
24 throughout the litigation, even if the homeowner pays down  
25 below the statutory threshold.



1           The purpose is -- so the purpose of this statute is  
2 to protect the homeowner's equity in their home, protect them  
3 from losing their homes over very small amounts of money that  
4 are actually owed to the HOA. That's what the California court  
5 discussed.

6           And as far as meeting elements, the Arizona law  
7 recognizes that the remedy of foreclosure, which is really what  
8 this is all about, they want to foreclose on the unawarded  
9 attorney's fees that we haven't been able to challenge. The  
10 remedy of foreclosure, according to the case -- I just had  
11 it -- Harbel Oil Company v. Superior Court of Maricopa County,  
12 86 Ariz. 303, Supreme Court 1959, discusses that the remedy of  
13 foreclosure is, quote, harsh; quote, extraordinary; and quote,  
14 a drastic remedy.

15           So we have that, and we're also arguing that they're  
16 not even entitled to that harsh, drastic, and extraordinary  
17 remedy because the law doesn't allow them. It's -- the money  
18 has been paid below the threshold. They can seek those  
19 attorney's fees in a different count in their complaint.

20           So we maintain that good cause exists. We recognize  
21 that there was a delay, but there's factual issues as to why  
22 there was that delay: The language barrier. I mean, my client  
23 isn't here, I don't have an affidavit so I can only tell you  
24 what I know, is that he thought there was a deal; there was no  
25 deal.



1           And it wasn't like he had a deal and he just was  
2 like, I'm not -- I'm just going to ignore this until, you know,  
3 they come and get a judgment from me. There are -- you know,  
4 he does have positions. Unfortunately, I don't have, you know,  
5 a declaration in front of me or I didn't bring it with me to  
6 discuss those. But it really comes down, this is a foreclosure  
7 case and they're not entitled to the foreclosure.

8           THE COURT: Okay.

9           MR. KUBERT: And we'd ask that the Court open the  
10 case and just let us defend it. And no prejudice to the HOA.  
11 They've been paid 5,000 of the 8,200 that's owed. We're going  
12 to foreclose on the rest, the 3,300 that it's fees that we  
13 don't even know what they are, if they're even reasonable?  
14 That can't be the law.

15           Thank you, Judge.

16           THE COURT: Okay. With regards to the motion to set  
17 aside judgment -- or set aside Mr. Mejia's default, I'm denying  
18 the motion to set aside the default for Mr. Mejia. I don't  
19 find excusable neglect.

20           Based upon the information provided to the Court, he  
21 was served. He's had ongoing contact with Plaintiffs. And he  
22 did not follow through with filing an answer after being served  
23 with a complaint and after being served with the application  
24 for the entry of default.

25           I don't find the fact that English may not be



1 something that he's fluent in -- I'm looking at a reasonable,  
2 prudent person standard, and it sounds like information  
3 provided is he had the ability to have someone else interpret  
4 for him. And he -- he was aware enough of this case to make  
5 contact with the Plaintiff and try to resolve it on his own  
6 accord, but never followed through with filing an answer.

7 So I am continuing to find that he's in default.  
8 Whether or not you want me to rule on whether or not he's  
9 satisfied with the payment of assessments, and there's no right  
10 to foreclosure, I'm not going to rule on that yet because I  
11 don't have anything in front of me at this point in time  
12 showing me what amounts and assessments are owed. So we'll go  
13 forward with a contested hearing.

14 It's now 11 o'clock, I'm going to have to set it for  
15 another date for a contested date regarding the damages.

16 MR. KUBERT: I'm just a little confused, Your Honor,  
17 on what --

18 THE COURT: The motion --

19 MR. KUBERT: I understand the motion --

20 THE COURT: -- to set aside default, I find he's in  
21 default. He needed to answer and he didn't.

22 MR. KUBERT: Okay.

23 THE COURT: And there's no excusable neglect. You  
24 have to have all three --

25 MR. KUBERT: I understand --



1 THE COURT: -- I'm not even getting the -- looking at  
2 the other two because I don't find excusable neglect.

3 MR. KUBERT: I understand. I'm just looking for  
4 clarification on what our next step is. Would the Plaintiff be  
5 moving for default judgment, and how does that square with us?  
6 Meaning --

7 THE COURT: Well, clearly he's moving for a default  
8 judgment because there's none out there.

9 MR. KUBERT: No, I understand --

10 THE COURT: There is a pending one.

11 MR. KUBERT: No. I understand that. If your ruling  
12 is that the -- a lien of foreclosure is not before Your Honor,  
13 and there's going to be a contested hearing on that, I'm --

14 THE COURT: No. I'm not saying it's not before me.  
15 I'm saying that's not a decision maker on the motion to set  
16 aside the default. The default is whether or not there is  
17 meritorious defense.

18 I guess you're making an argument that he had a  
19 meritorious defense --

20 MR. KUBERT: Correct.

21 THE COURT: -- that he paid the lien foreclosure.  
22 But I'm not even getting there because I don't find excusable  
23 neglect; he's in default. So the next stage is to -- the  
24 contest of damages.

25 So Plaintiff will be able to present to me what they



1 believe is owed, and you'll be able to respond and present your  
2 side as well. I'm going to take into consideration what you've  
3 been arguing about 33-1807(a). I'm going to take into  
4 consideration 8.3 of your CC&Rs in that regard. But that's not  
5 part of the motion to set aside default at this point.

6 MR. KUBERT: I understand.

7 THE COURT: Okay.

8 MR. KUBERT: Just a little clarification on looking  
9 at how I'm going to be able to brief the next round or  
10 (indiscernible) hearing on --

11 THE COURT: Well, we're going to set it -- I'm going  
12 to set it for a hearing, an evidentiary hearing --

13 MR. KUBERT: That's what I wanted to know.

14 THE COURT: -- and you're free to bring it -- I know  
15 that you all have filed a notice of documents in there. I'm  
16 going to -- but it will be an evidentiary hearing and you can  
17 present that. And it's Plaintiff's burden to show that, so  
18 Plaintiff will go first, and you'll be able to respond.

19 MR. KUBERT: So will we have the opportunity to brief  
20 the issue on whether they are entitled to obtain a judgment and  
21 foreclose on those amounts --

22 MR. MORGAN: Your Honor --

23 MR. KUBERT: -- statute?

24 THE COURT: Well, you've already mentioned it in your  
25 motion. I've already heard you argue it. I don't think you



1 need to brief it. I'm just saying it's not part of my decision  
2 for the motion to set aside the default.

3 My decision for the motion to set aside the default,  
4 he didn't show me excusable neglect --

5 MR. KUBERT: I totally understand that --

6 THE COURT: Okay.

7 MR. KUBERT: -- I'm just -- next, that's all I'm  
8 asking.

9 THE COURT: The next stage, you're free to continue  
10 that argument. But I've already heard your argument, so I  
11 don't need anything further, I don't believe. I don't believe  
12 I need any further briefing on it.

13 Okay. Mr. Morgan?

14 MR. MORGAN: I was just going to say that I think the  
15 rules are pretty clear for an evidentiary hearing. They  
16 certainly can hear and argue, but as far as other pleadings, if  
17 they're in default, that's the limitation of what they can do.  
18 So I was just supporting what the Court was saying.

19 THE COURT: Okay.

20 MR. KUBERT: Well, that's really what I'm asking. Am  
21 I limited to arguing further about their entitlement to what  
22 they're seeking, or am I just --

23 THE COURT: No. I know what your argument is. I  
24 know it's 33-1807(a), and I know what your position is in  
25 regards to that. And you're free to still argue that, but I



1 don't believe that I need any -- I'm not ordering you to do any  
2 further briefing on it because you made it part of your motion,  
3 as part of your defense that you were arguing.

4 But at this point in time, I'm not saying that you  
5 have to continue to file something in writing in regards to  
6 that. I think you've argued 33-1807(a).

7 MR. KUBERT: For the record, may I request findings  
8 for this hearing? May I get a record of that?

9 THE COURT: Okay. I find that Mr. Mejia was served.  
10 Let me pull up my -- let me find my -- I find that Mr. Mejia  
11 was personally served on May 11th, 2016. I find that he failed  
12 to file an answer.

13 I find that there was an application for the entry of  
14 default filed on December 8th, 2016, after he failed to file  
15 the answer. He was given ten business days after that,  
16 effective, to file an answer; he failed to do so. He did not  
17 file an answer until May 14th, 2017, to file his answer, which  
18 was beyond the time of the time period for the default to  
19 become effective.

20 I find that he was in default. I find that he did  
21 not have an excusable -- a reasonable excuse to fail to file an  
22 answer. And at this point in time, because he's failed -- I  
23 don't find excusable neglect in his failure to file an answer.

24 I find that the information presented to the Court  
25 was provided through affidavits. He indicated in his affidavit



1 that he did not understand, due to not speaking English;  
2 however, I find that it does appear he was acting  
3 appropriately. He made contact with Plaintiff, he made two  
4 offers. They accepted the second offer.

5 I find that they sent it to him, I find that he did  
6 not respond back. I find that he indicate -- they indicated  
7 that he reported that he had someone in his family that could  
8 help interpret and failed to do so. So I don't find -- or I  
9 find that he has not shown excusable neglect. So I find that  
10 the default continues to stay in effect.

11 If you want me to, I can have the Plaintiff submit a  
12 proposed findings of fact, conclusions of law in regards to  
13 that, but I think that would only drive up his attorney's fees  
14 and costs. But it's up to you if you want me to have them  
15 drafted --

16 MR. KUBERT: No. That -- what you just provided  
17 is -- thank you for that.

18 THE COURT: Okay.

19 MR. MORGAN: And, Your Honor, if I may, just one  
20 final item. The Court acknowledged, essentially -- or asked  
21 Defendant's counsel, have they reached out to us to try and get  
22 this worked out. We would love to avoid an evidentiary  
23 hearing.

24 If they have questions about things that are on the  
25 ledger or attorney's fees or whatever else, we're happy to try



1 to resolve that without the intervention of the Court. We are  
2 concerned with the increasing cost of this, and just want to  
3 make sure that that's on the record, that we are ready,  
4 willing, and able to try and get this resolved without going to  
5 an evidentiary hearing, and unnecessary costs associated with  
6 that.

7 MR. KUBERT: As are we.

8 THE COURT: Okay. Well, I would encourage you then  
9 to maybe sit down and talk with each other. It's not quite  
10 lunch time yet, you could step out into the hall and try to  
11 maybe work something out.

12 I'm not saying at this point that I've made a ruling  
13 on how I interpret 33-1807(a). I do know that there's a  
14 redemption period even if the Court grants a judgment before  
15 the person -- well, the person has the time to redeem for the  
16 six months. I would encourage you all to talk that over, but  
17 I'm going to set an evidentiary hearing date for you.

18 And I actually had some time open up, because I  
19 canceled a vacation.

20 MR. MORGAN: I'd rather have you take the vacation,  
21 Your Honor. It's no fun to have to cancel a vacation.

22 THE COURT: It's all right, though. So I actually  
23 have time on Friday, June 16th. I know that that's pretty  
24 close, but I have the majority of the morning that I can use  
25 for an evidentiary hearing with regards to damages.



1 MR. KUBERT: I'm sorry, Your Honor. I've got  
2 depositions scheduled for a trial coming up on a case.

3 THE COURT: I have some time on the 14th, probably  
4 from about 10 o'clock to noon if you wanted to do it on June  
5 the 14th. I could also do it between 1:30 and 2:30 that day,  
6 if you want to do it then.

7 MR. MORGAN: I believe that works for us. We'd have  
8 to double check. Normally we have a community manager here, so  
9 I have to check with her schedule.

10 (Counsel confer)

11 MR. MORGAN: 10:00 to 12:00, you said? 10 o'clock?

12 THE COURT: 10:00 to 12:00.

13 (Counsel confer)

14 MR. MORGAN: Okay. So I think that would work for  
15 us, Your Honor.

16 MR. KUBERT: I can make it work, Your Honor. I mean,  
17 I would prefer it be pushed out a little bit to give us an  
18 opportunity to settle, and I do have depositions I'm trying to  
19 prepare for. But if that's all the Court has, then we can make  
20 it work.

21 THE COURT: I have Tuesday June the 20th at 10:00.  
22 From 10:00 to 12:00.

23 MR. MORGAN: To me, I'd rather get it done. I mean,  
24 if they're truly willing to settle, it shouldn't be hard to sit  
25 down, even in the next hour, and work something out.



1 THE COURT: Well, the 20th, that's four days later,  
2 four business days later. So --

3 MR. KUBERT: We can do -- I'm available on the 20th.

4 THE COURT: -- I can do that day. I have that space  
5 available.

6 MR. MORGAN: I know I have jury duty, but who knows  
7 what's going to happen on that.

8 THE COURT: Oh, you have jury duty on the 20th?

9 MR. MORGAN: I do.

10 MR. KUBERT: My depositions are actually over the  
11 19th, so the 20th would work. But I understand Mr. Morgan's  
12 schedule --

13 THE COURT: Okay. Well, can you make the 14th work,  
14 then? Otherwise I'm going to -- I have to push you to the 30th  
15 of June.

16 MR. KUBERT: That would work wonderful for us, but I  
17 understand that, you know, it's an extra two weeks. The 30th  
18 is very -- works well for us.

19 THE COURT: Do you think that's --

20 MR. MORGAN: That's a month away, I mean.

21 MR. KUBERT: Essentially two weeks --

22 MR. MORGAN: And it's right before the 4th of July  
23 long weekend. I don't know the --

24 THE COURT: Let me see the --

25 MR. MORGAN: I mean, we could potentially do the



1 20th, and I could have Mr. Maxwell or somebody handle the  
2 hearing potentially.

3 THE COURT: Okay.

4 MR. MORGAN: So why don't we just do that, the 20th.

5 THE COURT: 20th? Okay. Let's do the 20th then,  
6 10:00 to 12:00. Okay.

7 And I will let you go then to hopefully be able to do  
8 some talking before you leave the building.

9 (Proceedings concluded at 11:08 a.m.)

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## CERTIFICATE

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14 /s/

15 \_\_\_\_\_  
16 KAREN RAILE  
17 Transcriber

August 24, 2017



# **EXHIBIT C**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAVEEN MEADOWS HOMEOWNERS  
ASSOCIATION,

Plaintiff,

vs.

CARLOS MEJIA, ET AL,

Defendant.

No. CV2016-094391

Phoenix, Arizona

June 20, 2017

10:08 a.m.

BEFORE COMMISSIONER MARGARET BENNY

TRANSCRIPT OF PROCEEDINGS

Default Hearing/evidentiary Hearing

Proceedings recorded by electronic sound recording; transcript produced by AVTranz, an eScribers, LLC company.

KAREN RAILE  
Transcriptionist



I N D E XJune 20, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
Heather Yearack	14	25	42	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
Paul Monaghan	48	--	--	--	--

M I S C E L L A N E O U S

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EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
1 and 2		--	12
5	Correspondence	--	13
7	Check	--	14
3	Ledger	--	16
4	Letter	--	17
6	Ledger	--	19

DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
None			



APPEARANCES

June 20, 2017

Judge: Margaret Benny

For the Plaintiff:

Brian Morgan

William Nikolaus

Witnesses:

Heather Yearack

For the Defendant:

Jacob Kubert

Witnesses:

Paul Monaghan



Phoenix, Arizona

June 20, 2017

(Commissioner Margaret Benny Presiding)

DEFAULT HEARING/EVIDENTIARY HEARING:

THE COURT: Okay. We'll call Laveen Meadows versus Carlos Mejia. Let me take a moment while you all get ready.

I received Plaintiff's memorandum today, which referenced Defendant's memorandum, which I didn't receive a copy of, but I just pulled it off now. So I'm going to take a look. So -- but you can have a seat and pull out everything.

(Pause)

THE COURT: Okay. Let's go ahead and have parties announce, please.

MR. MORGAN: Brian Morgan and William Nikolaus on behalf of Laveen Meadows.

MR. KUBERT: Good morning, Judge. Jacob Kubert on behalf of Carlos Mejia.

THE COURT: Okay. Mr. Mejia isn't here today?

MR. KUBERT: No, Your Honor. He couldn't -- he wanted to be here, he couldn't take off. Trying to raise money.

THE COURT: Okay. We're here today because the Court had set a hearing as to damages. And to -- the Court did find Mr. Mejia previously in default.

Did counsel have the opportunity to consult and



1 discuss the matter with each other before coming forward with  
2 the hearing today?

3 MR. MORGAN: In some respects. We did talk about  
4 potential settlement, we did ask if there were any specific  
5 items on the ledger that were objected to. There were no  
6 specific items objected to during the course of the last two  
7 weeks or so. We were not able to reach a settlement.

8 THE COURT: Anything you want to add in that regard,  
9 counsel?

10 MR. KUBERT: No, Your Honor. That's accurate. We  
11 had some discussions and were unable to resolve.

12 THE COURT: Okay. We'll go forward then with the  
13 hearing. I've had a chance to read both of your hearing  
14 memorandums. And we'll start with Plaintiff.

15 MR. KUBERT: Your Honor, if I may before they begin,  
16 just as a housekeeping matter. We'd still ask Your Honor  
17 if -- to render a ruling on whether the HOA is entitled to the  
18 remedy that it seeks before we proceed to the actual awarding  
19 of that remedy.

20 We do ask -- we pled in our motion papers, and we  
21 think it's incumbent that we ask whether the Plaintiff can take  
22 the prior judgment and -- prior money judgment and foreclose on  
23 it, and whether the statute, if it's paid down below the  
24 statutory minimum, whether (indiscernible) would be  
25 foreclosure. And we would just ask for a ruling on that for



1 the record, please.

2 THE COURT: Okay. Well, with regards to the second  
3 part of that, if it's now less than the minimum, I believe if  
4 it was at the required amount at the time that the complaint  
5 was filed, then they can go forward with what remains. Okay.

6 With regards to the prior judgment, tell me a little  
7 bit about what the judgment entailed in the prior -- the prior  
8 judgment.

9 MR. MORGAN: Yes, Your Honor. So before proceeding  
10 with the foreclosure action, the Association, pursuant to the  
11 governing documents and as the statute allows, pursued money  
12 judgment, personal judgment against Mr. Mejia; obtained the  
13 money judgment, and was unable to find any proper means of  
14 garnishment or other ways of enforcing that judgment. So they  
15 are now pursuing their statutory lien right as well as their  
16 contractual lien right to pursue the foreclosure for the full  
17 amount of the lien.

18 As indicated, this happens all the time, this is very  
19 common. It's a method that an association will take to try to  
20 keep the cost down. A personal judgment is much less expensive  
21 than a foreclosure judgment, both in costs and in attorney's  
22 fees.

23 And actually, a money judgment reaps the result of  
24 getting money coming in the door, which in fact during this  
25 process before foreclosure was started, Mr. Mejia did contact



1 our office in an attempt to work something out but then just  
2 didn't follow through. Again, it's happened in this action as  
3 well.

4 So in no instance is there a double recovery. Any  
5 payments submitted are applied. And so I think \$5,000 has been  
6 paid at this point. And this lien foreclosure will reflect  
7 that. I mean, it's not attempting to seek a double recovery  
8 against Mr. Mejia in any way.

9 THE COURT: But the prior judgment from 2013, the  
10 amounts -- what were the amounts and how much of those were  
11 assessments?

12 MR. MORGAN: I don't know the details on that, Your  
13 Honor. That's not -- I mean, that wasn't briefed, that wasn't  
14 an issue that was raised prior to the hearing. Again, we asked  
15 if there were -- we specifically asked and the Court asked  
16 counsel at the last hearing, are there any specific dollar  
17 amounts on the ledger that you contest? We asked the same  
18 question immediately after the hearing and there's been no  
19 response to that at all.

20 THE COURT: I seem to recall that that was something  
21 that was touched upon.

22 MR. MORGAN: Well, Your Honor, I think -- if we may,  
23 if we could proceed with the damages portion of the hearing, I  
24 think we have someone who can testify as to the amounts on the  
25 ledger and who can give some clarification as to that. And



1 right now, there's been a request to rule on something but  
2 there's no motion in front of the Court.

3 Right now all we have in front procedurally of the  
4 Court is a damages hearing. So I think that would be the  
5 appropriate method -- if he wants to raise issues in closing  
6 perhaps or cross-exam, he can do that. But I don't know that's  
7 relevant for this damages hearing in relation to the lien  
8 amount on the property.

9 THE COURT: Okay. Well, I think it is, but I'll  
10 allow your witness to testify as to it. You can go ahead and  
11 go forward.

12 MR. KUBERT: If I may respond to that.

13 THE COURT: Yes.

14 MR. KUBERT: Very briefly. Whether that -- while  
15 that may be a matter of convenience, bringing an old judgment  
16 to new, that is done all the time. I don't think that's a  
17 reason to accept that sort of practice.

18 I think bringing the -- taking a prior money judgment  
19 and transforming it into a foreclosable lien in a brand-new  
20 case raises a panoply of procedural matters, not the least of  
21 which is assessments which are over three years old; you cannot  
22 foreclose on them. It's a procedural issue, are they entitled  
23 to that remedy. If this 2013 judgment was a little bit older,  
24 you're running into problems with circumventing the renewal  
25 statute of the judgment --



1 THE COURT: I understand, but that's not an issue  
2 here, so we're not going to --

3 MR. KUBERT: No, but it raises issues with -- and res  
4 judicata has already been litigated, we're trying to resolve a  
5 new lawsuit with new money. So this is the reason why I raised  
6 these before so we can try to narrow these issues with this  
7 damages hearing. We can know, you know, where they're coming  
8 from with these damages --

9 THE COURT: And I'm letting you know -- and I know  
10 your position, because I've seen that and I believe that it's  
11 something that they should touch upon. So I'm going to allow  
12 them to have the witness testify in regards to it. And then  
13 you're free to question them and make argument.

14 MR. KUBERT: Thank you.

15 THE COURT: Okay. Let's have everyone who may be  
16 testifying today stand and raise your right hands, please.  
17 We'll swear you all in at once and we'll get the names of any  
18 witnesses.

19 PARTIES SWORN

20 THE COURT: Okay. Thank you. And may I have the  
21 names of the two witnesses, please?

22 MR. MORGAN: Heather Yearack, and second is -- he may  
23 or may not testify, but Paul Monaghan.

24 THE COURT: And is Yearack Y-U-R-I-C-K?

25 THE WITNESS: No. It's Yearack, it's Y-E-A-R-A-C-K.



1 THE COURT: Thank you. And Monaghan, M-O-N-A-H-A-N?

2 THE WITNESS: A-G-H-A-N, yes, Your Honor.

3 THE COURT: G-H-A-N, thank you. Okay, thank you.

4 You can both be seated.

5 Mr. Morgan?

6 MR. MORGAN: Thank you, Your Honor. And just as a  
7 reminder, as kind of a housekeeping issue, last hearing I  
8 mentioned that I had jury duty today. I got off for this  
9 morning, but I may have to appear this afternoon. So I know  
10 the Court scheduled an hour for this hearing. If it goes  
11 beyond that, I'm waiting to get a text from my assistant as to  
12 whether or not I have to appear this afternoon or not, so.

13 THE COURT: Okay. Well, I'll have to reset it  
14 because I have a full calendar in the afternoon at this point,  
15 so.

16 MR. MORGAN: Sorry. I would need to leave here about  
17 11:30, 11:45 to get there on time. Mr. Nikolaus is here if he  
18 needs to finish the hearing, and I presume somebody will take  
19 that --

20 THE COURT: Okay. Thank you.

21 MR. MORGAN: -- so I just wanted to make you aware of  
22 that.

23 We did meet beforehand about entering exhibits into  
24 evidence, stipulating to those just to keep things moving  
25 along. We previously submitted to the Court Exhibits 1 through



1 7, and I have those. And we'd just like to see which of those  
2 we can stipulate to right off the bat.

3 Let me see if I -- okay. So Exhibit Number 1 is a  
4 copy of -- if I may approach?

5 THE COURT: Yes.

6 MR. MORGAN: This is a copy of a portion of the CCRs  
7 that are recorded on that, I guess the property. And I don't  
8 know the easiest way to do it, to just ask for all seven  
9 exhibits to be introduced and see what objections --

10 THE COURT: Okay.

11 MR. MORGAN: -- that would be the easiest way.

12 So Exhibit 1 is the portion of the CCRs. Exhibit 2  
13 is the warranty deed showing Mr. Mejia's ownership of the  
14 property.

15 MR. KUBERT: No objection to either of those two  
16 being stipulated in.

17 THE COURT: Okay. Exhibit 1 will be admitted.  
18 Exhibit 2 will be admitted.

19 (Plaintiff's Exhibits 1 and 2 Received)

20 MR. MORGAN: There's 2. And you want your second  
21 copy and --

22 THE COURT: No, we'll use the same copy.

23 MR. MORGAN: Okay.

24 Exhibit 3 is a copy of the ledger attached to the  
25 complaint, showing (indiscernible) the lawsuit was filed.



1 Exhibit 4 is correspondence sent to Mr. Mejia showing  
2 that the lawsuit was filed, and that was a request for payoff.

3 THE COURT: Do you have any objections to these two?

4 MR. KUBERT: I do, Your Honor, 3 and 4, yes.

5 THE COURT: I'll wait and I'll let you while you  
6 testify.

7 MR. MORGAN: Exhibit 5, Your Honor, is subsequent  
8 correspondence to Mr. Mejia with an enclosed stipulation --  
9 proposed stipulation for judgment after his request for a  
10 payoff was previously discussed at the prior hearing.

11 THE COURT: Do you have any objection to that?

12 MR. KUBERT: No objection to 5.

13 THE COURT: Exhibit 5 will be admitted.

14 (Plaintiff's Exhibit 5 Received)

15 MR. MORGAN: Your Honor, Exhibit 6 is an account  
16 ledger on Mr. Mejia's account that was used to calculate the  
17 amount owed at the time that the foreclosure judgment was  
18 submitted to the Court at the initial default hearing.

19 THE COURT: Any objection to that?

20 MR. KUBERT: Yes, Judge. We object to that  
21 Exhibit 6.

22 MR. MORGAN: And the final exhibit at this point is a  
23 copy of a check from the Desaulles Squaw Group (phonetic) trust  
24 account in the amount of \$5,000 received towards payments of  
25 the amounts outstanding.



1 MR. KUBERT: No objection.

2 THE COURT: Exhibit 7 will be admitted.

3 (Plaintiff's Exhibit 7 Received)

4 MR. MORGAN: Okay. I'd like to -- I would like to  
5 call Ms. Yearack to testify to the stand.

6 DIRECT EXAMINATION

7 BY MR. MORGAN:

8 Q Thank you for coming today, Heather. Can you please  
9 for the record state your name.

10 A Heather Yearack.

11 Q And could you spell your last name, please?

12 A It's Y-E-A-R-A-C-K.

13 Q Thank you. And Heather, can you describe your role  
14 in relation to Laveen Meadows Association?

15 A Currently I work for the management company that's  
16 contracted to manage Laveen Meadows as an accounting assistant.  
17 So I assist with various overflow projects for accounting,  
18 audits, researching. Just different accounting projects.

19 Q So -- and how long have you worked with PDS?

20 A I've worked at Plan Development Services for seven  
21 years.

22 Q Okay. And in your job dealing with the accounting,  
23 would you say that you're familiar with the way that items are  
24 posted to a homeowner's account?

25 A Yes, I am.



1           Q     Can you maybe describe a little bit of the process of  
2 what takes place before something is actually posted to a  
3 transaction ledger.

4           A     So our accounting department manually adds  
5 assessments, so every month, the annual assessment is broken up  
6 and it's added onto the ledger. If someone is late after the  
7 15th, there's a late fee added at that time also by someone  
8 from the accounting department.

9                     If there's any collection work internally done on the  
10 account, like to send a delinquency notice or things of that  
11 nature, at the time that those actions are taken those are  
12 added to the account. If there's any vendor charges like an  
13 attorney bill or something like that, those get approved by the  
14 manager from the board, and then also added to the account at  
15 that time.

16          Q     Okay. So what I'm handing to you right now is -- can  
17 you describe what that is?

18          A     This is a standard ledger from the software that plan  
19 development services uses for accounting.

20          Q     Have you had a chance to review this prior to today's  
21 hearing?

22          A     Yes, I have.

23          Q     Is there anything on here that you have questions  
24 about in relation to having it be posted to this account?

25          A     No.



1 Q Do the amounts that are posted at the back -- let's  
2 look at the amount dated May 1st, 2016. What is the amount  
3 showing right there?

4 A \$7,924.48.

5 Q Does that amount look like an accurate amount of what  
6 was owing on Mr. Mejia's account at the time that this ledger  
7 was printed?

8 A Yes.

9 Q Below that you'll see a handwritten note of \$322;  
10 what is that for?

11 A So the assessments are annual but they're billed on a  
12 monthly basis, so this would have been the rest of the  
13 assessment for 2016.

14 Q Okay. So based upon that, that dollar figure of  
15 \$8,246.48, is that an accurate representation of the amounts  
16 owing at the time the lawsuit -- the foreclosure complaint was  
17 filed?

18 A Yes.

19 Q Okay. Thank you.

20 MR. MORGAN: Your Honor, we would ask to admit  
21 Exhibit Number 3 into evidence.

22 MR. KUBERT: No objection.

23 THE COURT: Exhibit 3 will be admitted.

24 (Plaintiff's Exhibit 3 Received)

25 BY MR. MORGAN:



1 Q I'm handing you the letter dated June 2nd, 2016. Can  
2 you tell us what that is, just a brief synopsis?

3 A It's a letter from the Association's attorney,  
4 Maxwell Morgan, regarding a payoff amount for his account with  
5 Laveen Meadows.

6 Q Is this a document that would be found in the  
7 ordinary course of business with Laveen Meadows?

8 A Yes, it is.

9 MR. MORGAN: We would ask that Exhibit 4 be entered  
10 into evidence.

11 MR. KUBERT: I object on foundation. I don't think  
12 she's testified that she's seen it before.

13 BY MR. MORGAN:

14 Q Have you seen this letter before?

15 A Yes, I have.

16 Q And is this a letter or document that is kept in the  
17 ordinary course of business?

18 A Yes, it is.

19 MR. MORGAN: Your Honor, we move to admit Exhibit 4.

20 MR. KUBERT: No objection.

21 THE COURT: Exhibit 4 will be admitted.

22 (Plaintiff's Exhibit 4 Received)

23 BY MR. MORGAN:

24 Q Heather, I've just given you a document that we have  
25 tentatively labeled as Exhibit 6. Can you tell us what that



1 is?

2 A This is another ledger from our accounting software  
3 that we use for Laveen Meadows.

4 Q Have you had a chance to review this prior to today's  
5 hearing?

6 A Yes, I have.

7 Q And is there anything on there that appears to be  
8 inaccurate based on your understanding of the accounting?

9 A No, there's not.

10 Q The dollar figure of \$12,013.54 on the entry -- last  
11 entry of March 26th, 2017; is that an accurate depiction of the  
12 amounts owing as of the date of that ledger?

13 A Yes, it is.

14 Q There is, again, there are a few handwritten notes on  
15 there. The \$414, what would that consist of?

16 A The \$414 is going to be the remainder of the annual  
17 assessment that had not been added to the ledger yet at that  
18 time for the remainder of 2017.

19 Q Okay. And the additional amounts, late fees and  
20 litigation fees are deducted from that principal balance.  
21 You'll see some highlights and some asterisks on there. Why  
22 would those amounts be deducted from the principal balance?

23 A We weren't asking for the late fees because they were  
24 not included in the original judgment, is my understanding.

25 Q Correct. And what about the litigation fees? Any



1 idea on why those would be deducted?

2 A My understanding of them being deducted was because  
3 that was in regards to the foreclosure, and not the original  
4 judgment.

5 Q But so where would those litigation fees that are  
6 posted on the ledger, where would they be sought in the  
7 foreclosure action instead of in the principal amount?

8 A In the attorney's fees, I believe.

9 Q Okay. So that balance, the remaining balance of  
10 \$8,843.48, with the understanding that litigation fees and late  
11 fees may be asked for in different places in the judgment, does  
12 that represent an accurate dollar amount of what is owing to  
13 Laveen Meadows at the time the original proposed form of  
14 judgment was submitted to the Court?

15 A Yes.

16 Q Okay.

17 MR. MORGAN: Your Honor, we ask that Exhibit 6 be  
18 admitted into evidence.

19 MR. KUBERT: No objection.

20 THE COURT: Exhibit 6 will be admitted.

21 (Plaintiff's Exhibit 6 Received)

22 BY MR. MORGAN:

23 Q And as far as you are aware, here we have Exhibit 7.  
24 Can you tell us what that is?

25 A This is a check from the homeowner's attorney for



1 \$5,000.

2 Q And was that payment applied to the account,  
3 Mr. Mejia's account?

4 A Yes, it was.

5 Q So based upon -- are you aware of any other payments  
6 other than that \$5,000 payment that are not reflected on  
7 Exhibit Number 6?

8 A No.

9 Q So is it fair to say that after applying that  
10 payment, the \$5,000, the remaining principle balance owed to  
11 Laveen Meadows is \$3,843.48?

12 A To the best of my knowledge, that's correct.

13 Q Okay. Has the Association incurred attorney's fees  
14 in this action?

15 A Yes, they have.

16 Q And are they seeking to recover those attorney's  
17 fees?

18 A Yes, they are.

19 Q Has the Association paid the attorney's fees and  
20 costs up to date?

21 A To the best of my knowledge, yes, they have.

22 Q Okay. Is this a case -- with your understanding,  
23 would the board have liked to have settled this case earlier?

24 A Yes, they would have.

25 Q And does the Association typically pursue foreclosure



1 as a first option?

2 A No, not that I've seen in the seven years that I've  
3 been working there.

4 Q This is Exhibit 1 that I'll be referring to for a few  
5 minutes. Let's turn, if you could, to section 8.3 of the  
6 CC&Rs. Can you read towards -- I believe it's one, two, three,  
7 four, five, six, seven -- essentially eight lines from the end  
8 of paragraph 8.3, beginning with "the Association." Could you  
9 read that for us?

10 A I'm sorry, where are you --

11 Q Eight -- section 8.3 about eight lines from the  
12 bottom of 8.3. It says, common area, period, and then a  
13 sentence that begins, "the Association."

14 A Okay. I see.

15 "The Association may maintain a suit to recover a  
16 money judgment for unpaid assessments, rent, interest  
17 in attorney's fees and costs, and other  
18 litigation-related fees and costs without foreclosing  
19 or waiving the lien securing same. Recording of this  
20 declaration" --

21 Q That's okay. That's good.

22 A Okay, sorry.

23 Q So your understanding of this sentence, is it fair to  
24 say that the Association initially likes to pursue a money  
25 judgment before pursuing the foreclosure option?



1 A Yes.

2 Q But once they're obligated to pursue the foreclosure  
3 option, is it their expectation that they will recover the full  
4 lien amount?

5 A Yes.

6 Q Including any amounts that were previously reduced  
7 to --

8 A Yes.

9 Q -- a money judgment. Okay.

10 MR. KUBERT: I'm going to object, Your Honor.

11 MR. MORGAN: Question was already answered, Your  
12 Honor.

13 THE COURT: Go ahead. What's the objection?

14 MR. KUBERT: It calls for speculation of what the HOA  
15 believes, that she's a property manager.

16 THE COURT: I'm going to sustain that.

17 BY MR. MORGAN:

18 Q So based upon your experience, your seven years'  
19 experience as a representative of not only Laveen Meadows, but  
20 hundreds of associations over the course of the last seven  
21 years, is it fair to say that an association would prefer not  
22 to pursue a foreclosure action?

23 A In my experience, that is correct.

24 Q So --

25 MR. KUBERT: Objection.



1 BY MR. MORGAN:

2 Q -- then when you're saying --

3 THE COURT: Just a second. What's the objection?

4 MR. KUBERT: I'm sorry, same objection.

5 THE COURT: Thank you. I'll sustain.

6 MR. MORGAN: Your Honor, a couple -- I mean, if I  
7 may. Number one, the objection isn't raised before the  
8 question is answered, and so therefore the objection should be  
9 waived.

10 But number two, his objection was -- he said that he  
11 doesn't know what PDS was thinking or he doesn't know what  
12 Laveen Meadows was thinking. That isn't the question in this  
13 particular case.

14 So if it's the same objection, that's not going to  
15 what Laveen Meadows was particularly thinking. That was going  
16 to Ms. Yearack's experience for seven years and how  
17 associations handle collection matters.

18 THE COURT: Okay. I understand. You can go ahead  
19 and go forward then.

20 MR. MORGAN: Okay. So that objection was overruled  
21 then?

22 THE COURT: Yes.

23 MR. MORGAN: Okay. Thank you.

24 BY MR. MORGAN:

25 Q So in referring to Exhibit 6 once again, which is the



1 transaction ledger dated March 29th, 2017, as well as the  
2 accompanying ledger dated May 9th, 2016, Exhibit 3, do those  
3 amounts include amounts previously reduced to a money judgment?

4 A I'm not sure I understand.

5 Q So if the Association previous to going to the  
6 foreclosure obtained a money judgment, would those amounts be  
7 reflected on these two ledgers combined?

8 A Yes, they would be.

9 Q Okay. Why is there no attempt to take those amounts  
10 out of this ledger?

11 A The ledger doesn't reflect that there was any  
12 payments made for a long period of time, so there would not  
13 have been any decrease in the balance due to non-payment.

14 Q Okay. So let's say, for example, since you  
15 understand how the accounting works, let's say Mr. Mejia sold  
16 his home or lost his home through a bank foreclosure. The  
17 amounts that are listed on these ledgers, how would you account  
18 for these once Mr. Mejia moved out of the property?

19 A It depends on how he moved out of the property. So  
20 the first instance where you said if he sold the home, because  
21 there's a lien on the property, this would have been collected  
22 in a closing so they could actually close escrow.

23 And also, for the second thing that you said, if it  
24 would have been foreclosed on. Typically in my experience,  
25 what I've seen is that the amounts would then either be sent to



1 an attorney's office to collect after the fact if he no longer  
2 owns the home, or it would have been sent to a collection  
3 agency because the Association's trying to recoup the money  
4 that they're owed.

5 Q So if money comes in the door on these accounts, is  
6 there any possibility of obtaining a double recovery: One for  
7 the money judgment, and one for the foreclosure?

8 A No.

9 Q Why not?

10 A Because there's only one balance, so any payments  
11 that come in are going to be applied directly to the ledger per  
12 the statute, paying off the balance that's owed.

13 Q Okay.

14 MR. MORGAN: Your Honor, no further questions.

15 THE COURT: Mr. Kubert?

16 CROSS-EXAMINATION

17 BY MR. KUBERT:

18 Q Ms. Urback (sic), is it?

19 A Yearack.

20 Q Yearack, sorry. In your experience, seven years  
21 working for a property manager for HOAs, what is your  
22 experience when a homeowner has a prior judgment such as in a  
23 case like this with Mr. Mejia, and that homeowner files for  
24 bankruptcy, what happens with that prior judgment?

25 MR. MORGAN: Objection, Your Honor. Relevance.



1 THE COURT: You want to explain the relevance?

2 MR. KUBERT: It has relevance because it goes to our  
3 original claim that the remedy is not -- it's a damages issue,  
4 and the remedy's not available if there's a defense available.  
5 So I want to know if he were to file for bankruptcy, what would  
6 happen with the money being sought here today. Would he still  
7 be -- would the damages amount on a prior judgment be  
8 incorporated into this new judgment or not. It's an aspect of  
9 the damages.

10 MR. MORGAN: Your Honor, that calls for speculation,  
11 number one. Number two, there has been no bankruptcies filed.  
12 And number three, this is a damages hearing, it's not -- it's  
13 the amount of damages. Defenses are not allowed to be  
14 presented, they are waived when they were not presented and  
15 answered.

16 THE COURT: Okay. I'm going to go ahead and allow  
17 him to ask the question.

18 BY MR. KUBERT:

19 Q Would you like me to repeat that?

20 A Yes, please.

21 Q When a homeowner has a prior money judgment entered  
22 against him, what position does the property manager take with  
23 respect to the new lawsuit if that homeowner files for  
24 bankruptcy?

25 MR. MORGAN: I'm going to object to it again based on



1 it requires a legal conclusion.

2 MR. KUBERT: It's not a conclusion, it's whether  
3 she's going to pursue that money or not. Has it -- what's  
4 happened with the ledger? She can testify, not Mr. Morgan.

5 THE COURT: I'll allow him to -- I'll allow him to  
6 ask the question, I'll allow her to answer with regards to the  
7 ledger.

8 THE WITNESS: When there's a bankruptcy involved, we  
9 typically get legal advice from the Association's attorney as  
10 to how to proceed.

11 BY MR. KUBERT:

12 Q Do they typically back the amounts awarded in the  
13 prior judgment out of the new ledger?

14 MR. MORGAN: Objection, Your Honor. Asked and  
15 answered.

16 MR. KUBERT: It wasn't.

17 THE COURT: Overruled.

18 THE WITNESS: Can you ask that again? I'm sorry.

19 BY MR. KUBERT:

20 Q Do the amounts in the new ledger -- does the prior  
21 judgment get backed out of the ledger?

22 A In our accounting practices, we don't back it out of  
23 the ledger, we split the account into a pre-petition and  
24 post-petition balance until our attorney lets us know how we  
25 should proceed legally.



1 Q So will the HOA proceed with obtaining a judgment  
2 that also incorporates the prior judgment, or no?

3 MR. MORGAN: Same objection.

4 THE COURT: Overruled.

5 THE WITNESS: It depends. It's not across the board  
6 all the same every single time, so that would be on a  
7 case-by-case basis depending on what our attorney advised us to  
8 do.

9 BY MR. KUBERT:

10 Q Can you give me an example of a case where it does  
11 happen, where the homeowner does file bankruptcy and the prior  
12 amount of the judgment is still carried over into the next  
13 proceeding?

14 MR. MORGAN: Your Honor, again, this calls for  
15 speculation. It's irrelevant as to this particular case with  
16 Mr. Mejia, who has not filed bankruptcy. And if he does file  
17 bankruptcy, then we have a totally different situation where we  
18 go for a bankruptcy.

19 MR. KUBERT: I'd like to know what happens if he  
20 does.

21 THE COURT: Okay. I'm going to overrule it. I  
22 understand where he's coming from. And it's a hypothetical.

23 THE WITNESS: Can you --

24 BY MR. KUBERT:

25 Q -- answer --



1 A -- ask the question again, please?

2 Q Can you give me an example where -- in a case that  
3 you continue pursuing the amounts of the prior judgment in the  
4 second action, even though the homeowner filed for bankruptcy.

5 A To the best of my knowledge, I don't have account  
6 specifics. I know that sometimes it's happened and sometimes  
7 it hasn't happened. I don't know the details of every case.

8 Q So it has happened that prior money judgment awarded,  
9 homeowners filed bankruptcy, and in the second proceeding the  
10 HOA proceeds for a foreclosing on the amounts in the  
11 original -- in the first judgment; is that correct?

12 A I have not seen a foreclosure happen under those  
13 circumstances, no. Not that I recall.

14 Q So again, what happens with those amounts?

15 A It's possible that they're included in a lawsuit or  
16 they are written off. It depends on what the board decides to  
17 do for that case based on what their attorney advised them,  
18 whether or not it's collectible.

19 Q So have you ever seen the situation where the amount  
20 in the prior judgment is carried through a bankruptcy and  
21 foreclosed upon in the second action?

22 A Not that I can recall, no.

23 Q Okay. Do you know how long Mr. Mejia has lived in  
24 this HOA?

25 A No, I don't. Not off the top of my head.



1 Q Do you know if it was longer than five years or  
2 shorter than five years?

3 A All I have is what our ledger begins at, which is  
4 2011. So that would be my assumption, at least it's since  
5 then.

6 Q Okay. So since 2011, looking at -- if you have  
7 Exhibit 6 in front of you. Do you?

8 A I'm not sure what Exhibit 6 is. Mine aren't  
9 numbered.

10 Okay. I have that, uh-huh.

11 Q Looking at the first page of Exhibit 6, the  
12 assessment is \$46 per month; is that correct?

13 A That is what is charged monthly, yes.

14 Q Okay. And a late fee on that \$46 would be \$15 per  
15 month; is that correct?

16 A Correct.

17 Q So for a total of \$61 per month.

18 A If they're not paying on time, yes.

19 Q Okay. So that's the outermost amount of -- with  
20 assessments and late fees, not including interest or attorney's  
21 fees, just the assessment itself and the late fee, the total  
22 would be \$61 per month; is that accurate?

23 A Yes.

24 Q I probably should have started with Exhibit 3. I  
25 can't really tell them apart. Do you have it in front of you?



1 A Yes, I do.

2 Q Okay. Looking at the first page of Exhibit 3, it  
3 looks like the assessment and the date fee was the same. It  
4 hasn't changed since -- at least since September 2011; is that  
5 correct?

6 A That is correct.

7 Q Okay. So if we were to multiply all the assessments  
8 and late fees since 2011, since -- we'll even go before where  
9 this ledger starts, and for just the sake of round numbers,  
10 going from January 2011 to --

11 MR. KUBERT: I don't recall when the lawsuit was  
12 filed.

13 MR. MORGAN: I believe it was --

14 THE COURT: May 2016. May 11th.

15 MR. KUBERT: Thank you, Your Honor.

16 BY MR. KUBERT:

17 Q So from January 2011 to May 2016, that's about five  
18 years and five months; would you agree with me on that?

19 A Yes.

20 Q Okay. Five years, 12 months in a year. That's five  
21 times 12 is 60 months, plus another five months. So there's  
22 about 65 months -- well, there is 65 months from January 2011  
23 till May 2016 when the complaint was filed; would you agree  
24 with me on that?

25 A Yes.



1 Q Okay. 65 months times \$61 per month is \$3,965; would  
2 you agree with me on that?

3 A That sounds right.

4 Q Okay. And Mr. Mejia paid \$5,000; is that correct?

5 A That is correct based on the check that I saw, yes.

6 Q Okay. So is it fair to say that Mr. Mejia, that  
7 5,000 has at least paid off every conceivable assessment and  
8 late fee that he could have been charged with since the  
9 beginning of 2011, which is when he appears to have started to  
10 have been charged; is that fair?

11 MR. MORGAN: Objection, Your Honor. The question,  
12 number one, calls for a legal conclusion. Counsel has failed  
13 to acknowledge the fact that there may be different definitions  
14 of assessments, which may include more than simply the monthly  
15 or annual assessment.

16 MR. KUBERT: Your Honor, I would caution against the  
17 speaking objection. If counsel has a specific rule objection I  
18 appreciate that instead of being able to coach the witness.  
19 I'm having enough time -- hard time as it is.

20 THE COURT: Okay. You're free to ask a question  
21 after cross is through. I'll go ahead and overrule it.

22 BY MR. KUBERT:

23 Q So the question again is, if the total assessments  
24 and late fees since the beginning of 2011 is three -- \$3,965,  
25 and he's paid \$5,000, then it appears he has paid every last



1 assessment and late fee that has -- could conceivably been  
2 charged against him; is that correct?

3 A Yes.

4 Q And in fact, there's another \$1,035 left over; isn't  
5 that true?

6 A Based on the totals that you gave me, yes.

7 Q Okay. So even going on from May of 2016 to now  
8 June 2017, if we multiply that \$65 a month times another  
9 11 months since the complaint was filed, there's still money  
10 left over out of that 5,000 that would cover assessments and  
11 late fees; is that correct?

12 A There would still be money left over. However, I  
13 can't speak to what the amount and the collection costs would  
14 be --

15 Q I didn't ask that question --

16 A -- for him not paying for five years.

17 Q I'm not asking that question. I'm asking about  
18 assessments and late fees. He's paid every last dime of  
19 assessments and late fees that he could have possibly been  
20 charged since he's lived in that place; isn't that true?

21 A Based on the information that I was given, yes.

22 Q Okay. So anything extra that we're looking for today  
23 are non-assessments and late fees, such as attorney's fees,  
24 costs, things of that nature; isn't that correct?

25 A Yes.



1 Q Now, the total amount that the HOA has sought in this  
2 complaint is approximately \$8,800; is that correct?

3 A I don't --

4 Q I don't have the exact number in front of me. Would  
5 it be in Exhibit 3?

6 A I believe so.

7 Q So in this lawsuit alone, approximately, what,  
8 8,246.48 is on Exhibit 3, and on Exhibit 6 is \$8,843.48. So  
9 somewhere between -- in this lawsuit is 8,200 and 8,800 give or  
10 take --

11 A Yes.

12 Q -- is that fair? Okay. So if we're just focusing on  
13 this lawsuit, the 5,000 paid toward that would leave a balance  
14 just on the lawsuit alone of somewhere between 32- and \$3,800,  
15 is that -- is my math right?

16 A That sounds correct.

17 Q Okay. Now, you testified before that in your  
18 experience, the HOAs would prefer to settle, and that they  
19 would have liked to settle this case earlier than -- you know,  
20 we're now a few hearings in and both sides have incurred some  
21 fees; isn't that correct?

22 A Yes.

23 Q Okay. So with the 5,000 paid leaving the balance of  
24 give or take 3,200 to 3,800, if I would have told you that  
25 Mr. Mejia offered \$2,000 more on top of the 5,000, would that



1 have been something the HOA would have considered to settle  
2 this amount?

3 MR. MORGAN: Objection, Your Honor. That's Rule 408.

4 MR. KUBERT: You opened the door.

5 THE COURT: How so?

6 MR. KUBERT: He asked her whether the HOA would have  
7 liked to settle this case earlier rather than sooner, and he  
8 opened the door to whether this case could have been settled.

9 MR. MORGAN: We never discussed specific settlement.  
10 That was a question the Court asked in the very beginning.  
11 That's not proper for (indiscernible).

12 MR. KUBERT: Well, Your Honor, these are all fees,  
13 and the fees will be ultimately decided by this judge, and  
14 settlement is an element for fees.

15 THE COURT: You can go ahead and ask the question.

16 THE WITNESS: What was the question?

17 BY MR. KUBERT:

18 Q The question was, given the HOA's preference to  
19 settle rather than pursue foreclosure, would it have surprised  
20 you that if there was only between 32- and \$3,800 left over,  
21 that Mr. Mejia offered to pay \$2,000 towards that amount to  
22 settle this case? Would that have surprised you if that  
23 settlement was made?

24 A I can't speak if it would have surprised me.  
25 However, I don't know how the Association would have felt



1 accepting that because I'm not the board. I don't make those  
2 kinds of decisions.

3 Q Are you aware that he made a \$2,000 offer?

4 A Personally I'm not aware of that, no.

5 Q Do you know if the HOA was made aware of that offer?

6 A I don't know. I wasn't involved in that part of it.  
7 I don't know.

8 Q Do you have any decision-making authority to accept  
9 settlements on behalf of the HOA?

10 A No, I do not.

11 Q Okay. Do you receive -- does the management company  
12 receive monthly invoices from the HOA's attorney?

13 A Yes, we do.

14 Q Okay. The line-by-line items of the work performed  
15 on various tasks?

16 A Yes, I believe so.

17 Q Do you know for sure if you receive the bills, the  
18 actual invoices that show the work performed, or do you just  
19 receive these documents like Exhibit 3 and 6, which appear to  
20 be ledger rundown summaries?

21 A No. The ledgers are what we prepare as the  
22 management company. When the accounting department receives an  
23 invoice it gets approved and then added to the ledger. We  
24 don't just add numbers out of wherever, we get them from the  
25 invoices that we receive from the attorney.



1 Q Okay. So the attorney sends the management company  
2 an invoice with line by line -- and that goes to somebody who's  
3 not you? It goes to the accountant; is that your testimony?

4 A Yes.

5 Q Okay. So the accountant would be the person to ask  
6 whether she had received the invoices with the line by line to  
7 see what tasks were performed on the --

8 A Specifically for this account, yes.

9 Q Okay. So if you look at Exhibit 6 --

10 A Okay.

11 Q -- the first page entry on January 29, 2015,  
12 attorney's fees in the amount of \$2,293.50. You don't know  
13 specifically what work was performed to generate that number,  
14 do you?

15 A So to explain the way that the ledger was done, this  
16 went from a deferred payment system to a pay as you go because  
17 of the changes that were made to the case at that time. So  
18 this is a typical, very regular thing that happens in  
19 accounting across our associations when they are in that  
20 situation with their attorney and they're changing their fee  
21 schedule. So that's not one charge, that's a move from a  
22 charge code 8 to a charge code 5.

23 Q So that number 2,293.50, can that be comprised of  
24 more than one invoice; is that what you're saying?

25 A Yes, that is what I'm saying.



1 Q Okay. And you haven't seen yourself either one  
2 invoice or any number of invoices that make up that number, do  
3 you -- have you?

4 A Personally I have not. I'm just letting you know  
5 that based on my experience, that is a normal accounting  
6 practice that we use on most of all of our accounts.

7 Q Do you know whether the invoices are forwarded from  
8 the accountant ever to the HOA, to the board so they can  
9 scrutinize the number, the invoices?

10 A If they request to see them, depending on whether or  
11 not they want to, they can be. They aren't on a regular basis  
12 because a lot of our board members don't care to see them ever  
13 single time.

14 Q So PDS doesn't customarily send the attorney invoices  
15 to the board?

16 A It depends on whether or not they want to see them.  
17 But on a regular basis, no.

18 Q And so if they're not given to the board on a regular  
19 basis, how are they paid?

20 A They're approved by their community manager, who has  
21 authority based on the board giving them authority to approve  
22 invoices. If they ever have any questions they can ask for  
23 them. They're open to them at any time, they're provided to  
24 them in their financials should they choose to look at them.  
25 So they are available to them.



1           They also do receive the monthly status reports  
2 giving them details on all of the cases. That is something  
3 that's included in their regular board packets, which does  
4 detail the things that were done. It just does not detail how  
5 much they were charged for those things on that report.

6           Q     Okay. So the board itself doesn't make the decision  
7 whether or not to pay a monthly invoice, it's the property  
8 manager that has that authority. That's correct, right?

9           A     To the best of my knowledge, that's typically what  
10 happens, yes, based on the board's prior agreement --

11          Q     Okay.

12          A     -- with their manager to give them authority.

13          Q     Are you aware how the HOA's attorneys bill them, as  
14 far as whether it's on a monthly basis or not or toward the end  
15 of a case, during a case, how that works?

16          A     It depends on the agreement that they have with them.  
17 Most of the time we get monthly invoices.

18          Q     Do you know what type of agreement this HOA has with  
19 Mr. -- the Maxwell (sic) firm?

20               MR. MORGAN: Objection, Your Honor. Attorney-client  
21 privilege.

22               MR. KUBERT: It's the agreement itself, it's not  
23 privileged.

24               THE COURT: Sustained.

25               THE WITNESS: Most of their accounts start with --



1 THE COURT: Hold on --

2 THE WITNESS: Oh, I'm sorry.

3 THE COURT: That means I agreed with Mr. Morgan.

4 THE WITNESS: I'm sorry.

5 BY MR. KUBERT:

6 Q Do you know whether or not the HOA has a signed  
7 engagement letter or retainer agreement with Maxwell Morgan?

8 MR. MORGAN: Objection. Attorney-client privilege.

9 THE COURT: How is this relevant, too?

10 MR. KUBERT: I'm trying to figure out what the HOA's  
11 obligation is to the firm, because that has a direct bearing on  
12 what my client is -- could face in the damages amount.

13 MR. MORGAN: Your Honor, Ms. Yearack already  
14 testified earlier that all attorney's fees have been paid.  
15 They've been invoiced and they've been paid. So I'm not sure  
16 where the questioning is going. That's already been asked and  
17 answered, in addition to the attorney-client privilege.

18 THE COURT: I'm going to sustain.

19 BY MR. KUBERT:

20 Q Is that your testimony, Ms. Yearack, that the HOA has  
21 paid all monthly invoices in this matter?

22 A To the best of my knowledge, yes.

23 Q And it's current?

24 A To the best of my knowledge, yes, it is.

25 Q Do you know what the total amount is sitting here



1 today, what the HOA has paid in attorney's fees on this matter?

2 A Off the top of my head, no, I don't.

3 Q Do you have a range? Is it more than 10,000? More  
4 than 15,000? More than 20,000?

5 A I don't know.

6 Q Is it more than 5,000?

7 A I don't know.

8 Q You don't know any -- have no idea what the HOA has  
9 paid the attorneys in this case? That's a crucial element to  
10 their claim for -- to foreclose on a guy's home. Do you think  
11 it's pretty important that --

12 A Considering the fact that --

13 Q -- are?

14 A Okay. I'll answer your question.

15 Q Go ahead.

16 A Considering the fact that our ledgers are accurate, I  
17 would be able to assume based on the ledgers that you have been  
18 provided that all of the attorney's fees that are listed on  
19 that ledger, line by line, have been paid up to that point.  
20 Anything beyond that I don't have in front of me so I wouldn't  
21 be able to give you an honest answer. But up to the point on  
22 the ledgers, yes, they have been paid.

23 Q Do you know if the HOA has paid any attorney's fees  
24 that aren't on either of these ledgers?

25 MR. MORGAN: Objection. Asked and answered.



1 THE COURT: Overruled. You can answer.

2 THE WITNESS: I don't know.

3 BY MR. KUBERT:

4 Q And just for the record, the HOA is currently asking  
5 for a judgment in this case that includes amounts that  
6 would -- were awarded in the prior judgment against Mr. Mejia?

7 A I believe so.

8 MR. KUBERT: Nothing further, Your Honor.

9 THE COURT: Thank you. Mr. Morgan?

10 REDIRECT EXAMINATION

11 BY MR. MORGAN:

12 Q Okay. Heather, if you could pull up Exhibit 1, which  
13 is the copy of the CCRs. And could you look on page 2, the  
14 definition of an assessment, section 1.6 in the CCRs. Can you  
15 read that for us?

16 A Sure.

17 "Assessments means the annual assessments, the  
18 special assessments, and any other amounts declared  
19 by this declaration to be part of the assessments or  
20 declared by this declaration to be secured by the  
21 lien created under section 8.3."

22 Q Thank you. Now, if we could look at section 8.2, on  
23 the next page, and that's entitled covenants with respect to  
24 assessments. Could you read -- let's read a few sentences  
25 there to explain what the assessments are.



1           A     Starting at the beginning?

2           Q     Yes.

3           A     Okay. Each owner by acceptance of his, her, or its  
4 deed or other conveyance instrument with respect to a lot is  
5 deemed to covenant and agree to pay the assessments levied  
6 pursuant to this declaration with respect to such owner's lot  
7 together with, A, interest from the date due at a rate equal to  
8 the greater of, i., ten percent or -- per annum; or, two, the  
9 annual rate of interest if any, then in effect for the new  
10 first-priority single-family residential mortgage loans  
11 guaranteed by Veteran's Administration; B, such late fees that  
12 may be established from the time -- from time to time by the  
13 board; C, such costs and reasonable attorney's fees, costs, and  
14 other litigation fees and costs as may be incurred by the  
15 association in seeking to collect such assessments.

16          Q     Okay. So that gives a list of some of the things  
17 that the Association is to collect. Down below, a few  
18 sentences later, starting with, "No owner shall be relieved,"  
19 can you tell us what that parenthetical -- well, go ahead and  
20 read that sentence up through the parenthetical.

21          A     "No owner shall be relieved of his or her or its  
22 obligation to pay any of the assessments or any other  
23 amounts owing by such owner to the association  
24 hereunder, all of which shall be deemed part of the  
25 assessments by abandoning or not using his, her, or



1           its lot, or the common area, or by leasing or  
2           otherwise transferring occupancy rights with respect  
3           to his or her or its lot."

4           Q     Okay. So before you testified that any conceivable  
5           assessment from the beginning of time from when Mr. Mejia owned  
6           his unit up to the time of that \$5,000 payment, that all  
7           assessments and late fees would have been paid. But that  
8           testimony didn't take into effect this provision in section  
9           8.2, did it?

10          A     No.

11                 MR. KUBERT: Objection. Leading.

12                 THE COURT: Sustained.

13                 BY MR. MORGAN:

14          Q     So tell us why then your testimony that was  
15           previously in relation to assessments and the fact that all  
16           assessments had been paid -- you testified before that yes,  
17           they have. Why now, after reading this, is that testimony  
18           different?

19          A     The way that the question was presented to me earlier  
20           was regarding the annual assessment amounts and the late fees  
21           as billed to the homeowner on a monthly basis.

22          Q     But isn't it true that the term "assessment" actually  
23           includes additional amounts or than just annual assessment --

24          A     Based on when --

25                 MR. KUBERT: Objection.



1 THE COURT: What's the objection?

2 MR. KUBERT: Yes.

3 THE COURT: What was the objection?

4 MR. KUBERT: Leading. I'm sorry, Judge.

5 THE COURT: Okay. Overruled.

6 BY MR. MORGAN:

7 Q Do you need me to repeat --

8 A Yes, I'm sorry.

9 Q So could you then explain why the testimony you  
10 previously gave in relation to assessments was perhaps  
11 inaccurate?

12 A Based on the definition of assessments from the  
13 actual CC&Rs includes other costs that the Association incurred  
14 to collect on the assessments as part of the assessments.

15 Q So would that include amounts, let's just pull up,  
16 for example, Exhibit 3, which is the ledger dated May 9, 2016.  
17 There is -- on June 1st, 2013, an attorney fee charge of  
18 \$870.06. Would that be considered part of the assessment of  
19 the CC&Rs?

20 A Based on what the CC&Rs say, yes.

21 Q How about a little further down, December 8, 2013.  
22 Attorney's fees of \$363.42, would that be part of the  
23 assessment?

24 A Yes.

25 Q Again on the next page, March 9, 2014, couple of



1 charges. \$22.50, \$385.38. Would those be part of the  
2 assessments?

3 A Yes.

4 Q And Heather, if -- if Mr. Mejia is not obligated to  
5 pay these amounts, who will pay for them?

6 MR. KUBERT: Objection. Speculation.

7 MR. MORGAN: There's --

8 THE COURT: Overruled.

9 MR. KUBERT: How does she know?

10 THE COURT: She's an accounting specialist. If she  
11 knows personally, she can answer.

12 THE WITNESS: When attorney's fees typically aren't  
13 paid, the Association takes a loss because they don't get to  
14 recover the cost that they had to incur to try to collect the  
15 amounts owed.

16 BY MR. MORGAN:

17 Q And so in essence, who ultimately pays the price of a  
18 delinquency where the full amount's not paid?

19 A Typically it has to go back into the budget, so the  
20 other homeowners for that community would have to absorb the  
21 cost.

22 Q Thank you. So you also mentioned that you did not  
23 know about an offer that came in to the board. Who would have  
24 been the person who would have made aware of any offer that  
25 would have come in?



1 A The community manager for the Association.

2 Q And who is that?

3 A Lisa Riesland (phonetic).

4 Q Okay.

5 MR. MORGAN: All right, Your Honor. No further  
6 questions.

7 THE COURT: Give me just a moment.

8 (Pause)

9 THE COURT: Okay. Thank you. You can be seated.  
10 Thanks for coming in.

11 Does either side anticipate that Ms. Yearack would be  
12 called back again or is she free to leave?

13 MR. MORGAN: I wouldn't be using her.

14 MR. KUBERT: No, Your Honor.

15 THE COURT: Okay, ma'am. You're free to leave if you  
16 choose.

17 THE WITNESS: Thank you.

18 THE COURT: Mr. Morgan?

19 MR. MORGAN: Your Honor, we have no further  
20 witnesses.

21 THE COURT: Okay. Anything else you wish to present  
22 today?

23 MR. MORGAN: We'd just like to reserve some for  
24 closing if possible.

25 THE COURT: Okay. Thank you.



1 MR. KUBERT: Your Honor, I'd like to call the  
2 gentleman from the HOA.

3 THE COURT: Okay. You can come up, sir.

4 And this was Mr. Monaghan. You've already been sworn  
5 in, so you can go ahead and have a seat.

6 THE WITNESS: Thank you.

7 DIRECT EXAMINATION

8 BY MR. KUBERT:

9 Q Good afternoon, sir. Can you tell me what your  
10 position is with the HOA?

11 A I'm sorry, actually with the residential services,  
12 not with the HOA.

13 Q You're not on the board or have any official capacity  
14 with the HOA itself?

15 A I'm an employee of Plan Development Services.

16 Q But you're not a homeowner within the HOA?

17 A I am not.

18 Q You're not an elected board member?

19 A No, sir.

20 MR. KUBERT: Your Honor, I apologize. I thought he  
21 was presented as someone with the HOA. I have no questions for  
22 this witness.

23 THE COURT: Okay. You can be seated.

24 Okay. Thank you. Mr. Kubert, is there anything else  
25 that you wish to present for your side?



1 MR. KUBERT: No, Your Honor. I'll just reserve for  
2 close.

3 THE COURT: Okay. I'll allow closings, then. We'll  
4 start with you, Mr. Morgan.

5 MR. MORGAN: Thank you, Your Honor.

6 The purpose of today's hearing is a hearing on the  
7 amount of damages. The question is not liability. Those  
8 issues, any issues related to defenses should have been raised  
9 in an answer or some subsequent pleading and were not.

10 The Court at the last hearing specifically found the  
11 default remained in effect, thereby precluding the raising of  
12 any additional arguments. At the last hearing, the Court  
13 admonished opposing counsel that no additional briefing was  
14 necessary, that the arguments had been made. Yet  
15 notwithstanding, a memo was filed with the Court which required  
16 a reply brief to be filed.

17 The rules are very clear on the scope of a hearing of  
18 this nature. It is specifically in regards to the amount of  
19 damages. We have had a witness who competently testified in  
20 relation to the amounts of those damages.

21 At the time the original judgment was filed, that  
22 amount -- the original form of judgment, I should say, was  
23 filed, the amount was \$8,843.48. There has been no rebuttal  
24 witness or testimony in relation to that dollar figure.

25 Ms. Yearack testified that a \$5,000 has -- \$5,000



1 payment has been made and applied to the account, thereby  
2 leaving the principal balance for foreclosure in the amount of  
3 \$3,843.48. Again, there's been no rebuttal testimony to  
4 contradict that. That is the amount.

5 In relation to attorney's fees that have been  
6 incurred, as specifically set forth in the CC&Rs, all amounts  
7 incurred by the Association, including reasonable attorney's  
8 fees, are part of the lien of the Association. It was  
9 testified that those attorney's fees have been paid up to the  
10 point of the foreclosure litigation, and we have submitted the  
11 China Doll affidavit, including the supplemental affidavit that  
12 was filed last night and delivered to the Court this morning;  
13 including the additional attorney's fees that the Association  
14 was forced to incur as a result of the actions the Defendant  
15 has taken over the last few months.

16 Those attorney's fees are part of this litigation,  
17 not part of this hearing. If the Court has specific questions  
18 about those attorney's fees or has a right to schedule another  
19 evidentiary hearing where those fees can be addressed. But for  
20 today, the purpose of today's hearing, the amount owing on the  
21 ledger, the \$3,843.48 is the principal balance, and that amount  
22 should be awarded.

23 Couple important things to remember, I know the Court  
24 has some questions in relation to the money judgment that was  
25 obtained previously.



1           There was a money judgment obtained, there is no  
2 question about that. The Court can always take judicial notice  
3 of other judicial proceedings, and that's not something that  
4 is -- the Association is trying to hide. In fact in the  
5 complaint itself, it specifically referenced the fact that a  
6 money judgment had been obtained, and the amounts requested in  
7 the foreclosure complaint included amounts that may have been  
8 reduced to a prior judgment.

9           Now, if there is a res judicata effect, it's only to  
10 the effect that it helps us in that those principal amounts  
11 were already awarded by a prior court. So the fact that we are  
12 seeking to foreclose on the Association's lien as allowed  
13 pursuant to section 8 of the CC&Rs, it's specifically in that  
14 section, and the witness has previously read that to the Court,  
15 that this is an independent action.

16           All amounts that were included in any money  
17 adjustment, as long as they have not been paid, can be included  
18 as part of the lien. Whether or not those amounts were used to  
19 judgment. Irrespective. That's not only the contractual law,  
20 but it's also the statutory law in Arizona 33-1807(g) (1), which  
21 again, specifically indicates that a money judgment or a  
22 foreclosure will not preclude one or the other.

23           We can -- the Association can pursue both avenues of  
24 recovery as long as there's not a double recovery. And the  
25 witness testified that there would be no double recovery, that



1 when amounts are paid, they're credited to the account and it's  
2 a done deal.

3 This amount, this lawsuit could have been resolved  
4 very easily. Had Defendant come to the Association after  
5 multiple times agreeing to pay the amounts that were owing, had  
6 he ever come to the Association and said, I don't understand  
7 this charge. Tell me what this is about. I want to know what  
8 this is. That could have easily been explained, and presumably  
9 an agreement could have been reached.

10 Even two, three weeks ago when the Court asked that  
11 same question of counsel, has there been any attempt to ask  
12 questions about the ledger, the answer was no. This morning  
13 again, just at the beginning of this hearing, the Court asked,  
14 has there been any attempt to go through the ledger and see if  
15 there are any questions, the answer was no.

16 Now, Your Honor, it's frustrating, the fact that we  
17 have to be here. We've had multiple hearings, and potentially  
18 another hearing on attorney's fees, all of which the  
19 Association is responsible for; and ultimately, if Mr. Mejia is  
20 not responsible for those as was testified, the homeowners will  
21 essentially be taxed because of the actions taken by Mr. Mejia  
22 in this litigation.

23 We would ask the Court to award the full amount of  
24 \$3,843.48 as set forth in the proposed form of judgment that  
25 was submitted this morning to the Court and filed last night.



1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. KUBERT: Thank you, Your Honor.

4 A default judgment is not some sort of judgment  
5 that's awarded as a matter of right. We're not here to be  
6 bystanders. There's long-established law that we have an  
7 adversarial proceeding here, and that a Defendant has a right  
8 to challenge a remedy that might not be available.

9 I understand that when a party is in default, there  
10 are certain limitations he has to challenge his -- to assert  
11 his position, certain allegations might be deemed admitted in a  
12 complaint. But as far as whether or not the judgment being  
13 sought can be obtained, that's two different questions.

14 So he has the ability to challenge this remedy, which  
15 is, again, it's an equitable remedy. It's in the  
16 judge's -- it's in this Court's broad discretion whether to  
17 grant that equitable remedy. And from the testimony today of  
18 the amount that's being sought in this complaint, not talking  
19 about the prior judgment -- that raises -- again, that raises  
20 numerous issues. We're talking about an amount that appears to  
21 be give or take a few thousand dollars, and that is what the  
22 HOA wants to take this man's home over.

23 Now, we're standing -- standing here right now, I  
24 would ask Your Honor, how do I save this man's house today? I  
25 mean, the amount being sought is probably going to dwarf the



1 remaining -- and the complaint he's paid after the \$5,000  
2 amount.

3 So that brings us back to the statute that, these  
4 amounts need to all be stripped down: The attorney's fees, the  
5 costs. There needs to be some type of definity (phonetic) on  
6 how a person can save his home. That's what he paid.

7 So again, this remedy is unavailable. And we've  
8 heard testimony that, if Mr. Mejia doesn't pay the HOA is going  
9 to be without a remedy. That's not the case, Your Honor. We  
10 have plenty of mechanisms in Arizona law that gives HOAs and  
11 all degree of persons, for that matter, redress. It's called  
12 obtaining a money judgment.

13 That's what is available to the HOA. Whether they  
14 collect it or not, that's a different story. But they do have  
15 that remedy to get a money judgment for these amounts.

16 What the HOA is asking this Court to do, and to keep  
17 track of it, is extremely difficult standing here right now.  
18 But the property manager essentially testified that an  
19 assessment, the definition of an assessment is not just an  
20 assessment, it's a late fee, it's the attorney fee, it's the  
21 cost, it's interest, it's everything. Everything is an  
22 assessment.

23 Well, the statute, 1807, specifically is 180 degrees  
24 against that position. The statute 1807 states that in order  
25 to foreclose, and again, it's a permissive may foreclose



1 statute which suggests that if the assessments are paid  
2 beforehand, there is no foreclosure. That statute says, strip  
3 down all the other fees and all the other amounts, and the  
4 foreclosure must be the \$1,200 of assessments only. You take  
5 out everything else.

6 And the statute goes through that -- it must say it  
7 three or four times to take out those amounts, take out fees,  
8 take out costs. The HOA is asking this Court to completely  
9 ignore that statute and call an assessment everything: An  
10 assessment, the late fee, the attorney fee, the cost, the  
11 interest, everything is defined as an assessment.

12 And the HOA says, well, it's a -- that's pursuant to  
13 contract. The HOA has a contract with the owner. So  
14 essentially, the HOA, the owner can contract their way around  
15 1807.

16 That's not the case, Your Honor. The statute trumps  
17 the CC&Rs. The HOA statute does not intend to have a small  
18 amount of assessments become the basis of a giant foreclosure  
19 award.

20 And taking the HOAs definition of what an assessment  
21 is, you can conceivably foreclose on zero dues owed to the HOA,  
22 but if the HOA incurred \$2,000 worth of letters and phone  
23 calls, you can straight foreclose on those \$2,000 worth of  
24 attorney's fees, because that's, according to the HOA, a  
25 definition of an assessment. That cannot possible be the



1 interpretation of how this procedure works. Which again, it  
2 all ties back to, you know, the remedy being available, which  
3 we maintain it's not.

4 Same type of analysis with regard to the prior  
5 judgment being tied into this one. We've heard it's a matter  
6 of convenience, it's just because that's the way it's on the  
7 ledger, the numbers carry over. I'm at a loss for words that  
8 that could be the practice.

9 I understand that's how HOAs have been doing it all  
10 along, but I can't imagine with the laws in place that we've  
11 raised, numerous -- that we've raised in the, you know, in the  
12 papers, and the argument, what happens if a party declares  
13 bankruptcy in between? What happens that they can just  
14 circumvent bankruptcy, what happens if the judgment expires,  
15 you can circumvent the expiration, you can circumvent the  
16 three-year lien foreclosure statute. That can't possibly be  
17 the interpretation.

18 They're limited to the 8,800 that they sought in this  
19 complaint. He paid 5,000 which Mrs. -- the property manager  
20 admitted under oath that he wiped out every conceivable  
21 assessment due and late fee that he could possibly have charged  
22 them since the dawn of day he lived in that community, and  
23 there was still a good thousand dollars left over to go to  
24 fees. He offered to pay more after the fact, no movement.

25 And here we are at the mercy of Plaintiff's counsel



1 of this gentleman losing his home because he decided to  
2 challenge this practice of just piling on when he was  
3 ready -- he had it pretty much paid.

4 So that's essentially our argument, Judge, is that  
5 foreclosure is unavailable. He's paid it almost out, he's paid  
6 every assessment that's possibly been owed.

7 And we haven't seen an invoice of what any of these  
8 attorney's fees are, any of these hearings over the last two  
9 months, nothing in the complaint, nothing was presented in the  
10 exhibits today of what even one work was done. All we have is  
11 line items for attorney's fees that somebody, not even from the  
12 HOA, says have been paid. She thinks have been paid.

13 No ruling on whether any of those fees and line items  
14 are even remotely reasonable, and yet here's Mr. Mejia who's  
15 about to lose his house.

16 I have nothing further, Your Honor.

17 THE COURT: Thank you.

18 MR. MORGAN: At the beginning of Defendant's closing  
19 argument, he says there's long-established law about how to  
20 challenge a remedy. There is. That was not done in this case.

21 This is a damages hearing, so the question is the  
22 amount of damages. And I understand there might be questions  
23 about those damages that -- raised in this type of a hearing.

24 The prima facie burden is upon us. We presented the  
25 case, we presented the ledger. We had an accountant who was



1 very competent in testifying as to the amounts owing. And  
2 there is no controverting evidence, not a single iota bit of  
3 evidence.

4 Had any attempt been made prior to this hearing to  
5 say, hey, we'd love to know the line items of the attorney's  
6 fees in question, would you mind producing those? Sure, we'd  
7 be happy to, we'd be happy to discuss that. But nothing of  
8 that was done.

9 Your Honor, when this case was first filed, Mr. Mejia  
10 contacted the Association through our office immediately  
11 saying, I want to get this resolved, I know it's important.  
12 And that was even before other instances when he tried to  
13 contact us during the money judgment and after the money  
14 judgment, and before foreclosure; after foreclosure was  
15 authorized but before it was filed. And then once it was  
16 filed, the day after, he contacts the Association and says, I  
17 want to get this paid, this is serious.

18 Well, the sad thing is, the legal arguments that  
19 we've heard from about April until now, I keep hearing things  
20 such as, there's long-established law that foreclosure is an  
21 equitable remedy. Foreclosure is not an equitable remedy.  
22 Foreclosure is a contractual and statutory obligation right.  
23 That's not equitable.

24 So the fact that these kind of arguments are being  
25 raised that completely fly in the face of the way the HOA law



1 has been morphed over the last 30 years, since our firm has  
2 been doing this, completely contrary to what the law says. And  
3 sadly enough for Mr. Mejia, the question was, how do we get him  
4 to save his home? The Association would have loved for him to  
5 have saved his home.

6 And had he worked out a payment agreement, had he  
7 done what he said he would do, he wouldn't be losing his home.  
8 In fact, guess what? There are remedies available if he wants  
9 to save his home. And it's pay the amounts owing.

10 Even if it goes to foreclosure, which we hope it does  
11 not, but even if it did, there's a redemption period. There's  
12 a six-month redemption period. He has a way to save his home.  
13 This is not about Mr. Mejia losing his home.

14 This is about what the law says, and about arguments  
15 that have been raised that are in reality, nothing more than  
16 gamesmanship. Instead of instructing Mr. Mejia to pay the  
17 amount due and owing, let's play this game. Let's pay this and  
18 hopefully we can get the rest thrown out. And you'll go back  
19 to your life, the Association will be out their fees, the  
20 homeowners all have to be essentially taxes because of your  
21 delinquency, but you can go on.

22 Well, that's not what the law says. There are plenty  
23 of mechanisms in place to collect delinquency, foreclosure  
24 being one of them. And unfortunately that was the option the  
25 Association was left to choose.



1           As a final matter, again, the arguments that were  
2 made in relation to the statute trumping the CC&Rs, that is  
3 nowhere in the law that it says that. There are certain  
4 provisions of the Condominium Act and Client Communities Act  
5 that say, notwithstanding what your CC&Rs say, then you have  
6 this remedy. But that is not what the lien provisions say.

7           So the fact that that is even raised again, it's  
8 contrary to the law, it's deceitful to the Court; and these  
9 arguments, which are being made over and over and over again  
10 shouldn't be condoned, but should be sanctioned.

11           Even this morning when the Court specifically said,  
12 I've looked at it and I find that the dollar amount per the  
13 statute needs to be in place at the time that the lawsuit is  
14 filed. Throughout the course of this hearing and the closing  
15 arguments, notwithstanding the Court's ruling, that issue came  
16 up over and over and over again.

17           This unfortunately has been a waste of the Court's  
18 time, of Mr. Mejia's money. But the law is what it is, and the  
19 damages are what they are.

20           There has been no controverting -- not an iota of  
21 controverting evidence to say otherwise. And we ask the Court  
22 to enter the judgment as provided.

23           Thank you, Your Honor.

24           THE COURT: I'll go ahead and rule by minute entry  
25 and take this under consideration. Thank you all for coming in



1 today.

2 MR. KUBERT: Thank you, Your Honor.

3 MR. MORGAN: Thank you, Your Honor.

4 (Proceedings concluded at 11:38 a.m.)

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August 25, 2017

