

2019 SEP 27 AM 10:13

1 R. L. Whitmer  
2 6333 N. Scottsdale Rd.  
3 Casita 21  
4 Scottsdale, Arizona 85250  
5 602.531.2615

6 Pro Per

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 R. L. WHITMER,

10 Petitioner/Plaintiff.

11 **CV2016-055080**

12 v.

13 **PLAINTIFF'S REPLY IN SUPPORT**  
14 **OF HIS MOTION FOR AN**  
15 **ALTERNATIVE FORM OF**  
16 **JUDGMENT AND REQUEST FOR**  
17 **SANCTIONS**

18 HILTON CASITAS HOMEOWNERS  
19 ASSOCIATION, also known as  
20 HILTON CASITAS COUNCIL OF  
21 HOMEOWNERS, also known as  
22 COUNCIL OF CO-OWNERS, also  
23 known as HILTON CASITAS  
24 COUNCIL OF CO-OWNERS;

25 Respondent/Defendant.

26 (Assigned to the Honorable  
27 Lisa Daniel Flores)

28 Defendant said that its reply is also a response to the Plaintiff's motion for an alternative form of judgment and the request for sanctions. Defendant's did not object to the Plaintiff's motion and request for sanctions except in the conclusion saying: "For the same, reasoning, Defendant HOA also requests that Plaintiff's request for sanctions be summarily denied." (p.10:16-17). The only reasoning, however, were the arguments about the award of attorneys' fees.

Defendant's attorneys are engaged in a pattern of misconduct as follows:  
a) they attempted to mislead the court to rule that an award of attorney fees be considered as an assessment lien pursuant to A.R.S. § 33-1256 and improperly included that in their form of judgment; b) misrepresented the case law regarding A.R.S. § 12-341.01, after they had abandoned that claim in their previous fee award in this case; c) requested an award of attorneys' fees which was vacated by the Court of Appeals; d) by misrepresenting the law, they

1 convinced Judge Anderson in 2017 that an administrative law judges have  
2 exclusive contempt of court jurisdiction pursuant to A.R.S. § 32-2199.02; and e)  
3 they claimed in their failed motion to dismiss CV2019-052885 that the non-profit  
4 corporation statutes regarding board action by email trumps the requirements of  
5 A.R.S. Title 33 Chapter 9 for open meetings.

6 The Court should reject the Defendant's bogus arguments that A.R.S. §  
7 12-341.01 apply here and grant the motion for an alternative form of judgment  
8 and impose sanctions as the Court deems appropriate.

9 **THE ALTERNATIVE FORM OF JUDGMENT SHOULD BE ADOPTED**

10 The Defendant clearly said that its "reply will address both flings..."  
11 (p.1:25) which included the alternative form of judgment.

12 The Defendant did not object to Plaintiff's alternative form of judgment and  
13 did not dispute or deny any of the Plaintiff's arguments or allegations against the  
14 Defendant's proposed form of judgment, and did not reason or explain its form of  
15 judgment. Defendant having chosen to concede these points, the Plaintiffs  
16 request the Court to enter the Plaintiff's alternative form of judgment. See  
17 *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979)  
18 (issues not argued are considered abandoned); *Compton v. National Metals*  
19 *Co.*, 10 Ariz.App. 366, 371, 459 P.2d 93, 98 (App. 1969); *In re Lamfrom's*  
20 *Estate*, 90 Ariz. 363, 368 P.2d 318 (1962); *Goldwaters, Inc. v. Medar*, 82 Ariz.  
21 344, 313 P.2d 410 (1957); *EFC Development Corp. v. F. F. Baugh*  
22 *Plumbing & Heating, Inc.*, 24 Ariz.App. 566, 540 P.2d 185 (1975); Ariz. R. Civ.  
23 P., Rule 7.1 (b) (party's failure to timely file and serve a responsive  
24 memorandum may be deemed a consent to the denial or granting of the  
25 motion, and the court may dispose of the motion summarily).

26 Therefore the Defendant's form of judgment should be rejected and the  
27 Plaintiff's form of judgment should be adopted as an undisputed form of  
28 judgment.

1                   **DEFENDANT’S ATTORNEYS MISREPRESENTATIONS WARRANT SANCTIONS**

2                   In their response (reply) the Defendant’s attorneys continued their willful  
3 misrepresentations of law and facts in clear violation of A.R.S. Sup.Ct.Rules,  
4 Rule 42, Rules of Prof.Conduct, E.R. 3.1.

5                   **1. Improperly requesting the Court to convert an attorneys’ fee**  
6                   **award in their proposed form of judgment into an association**  
7                   **assessment lien pursuant to A.R.S. § 33-1256**

8                   Attorney fees referenced A.R.S. § 33-1256 are only for the collection of  
9 unpaid assessments that are levied against a unit within the condominium and  
10 does not apply to attorney fees incurred outside the collection of delinquent  
11 assessments.

12                  The Defendant’s attorneys did not provide any foundation for the  
13 application of A.R.S. § 33-1256 in their form of judgment, nor did they provide  
14 any reasoned defense to the Plaintiff’s objection that their inclusion of A.R.S. §  
15 33-1256 in their form of judgment is improper and sanctionable.

16                  The Defendant’s attorney has a track record of distorting facts and law in  
17 order to bootstrap fees, in a CV 2005-015360 minute entry Judge Swan (now  
18 the presiding judge on the Court of Appeals) made the following findings:

19                               “The Court is simply a forum for the resolution of  
20                               disputes, not a weapon to be used to generate  
                                  leveraged fee awards.”

21                               “Compounding the Court’s concern is Mr. Shaw’s filing  
22                               of a plainly frivolous motion – purportedly pursuant to  
23                               ER 4.2 -- to prohibit Ms. Mobbs from contacting her own  
24                               homeowner’s association regarding this matter. As a  
25                               nonlawyer, Ms. Mobbs is not bound to the strictures of  
26                               ER 4.2. The Court has also reviewed Mr. Shaw’s March  
27                               21, 2006 correspondence to Ms. Mobbs in this regard,  
28                               and finds it to be abusive and inconsistent with the  
                                  fundamental principles of professionalism sought to be  
                                  advanced by the Supreme Court and the State Bar.<sup>2</sup>  
                                  Lawyers should perform their function with the dignity

1           rightly expected of officers of the Court. When a lawyer  
2           communicates in such fashion while representing a  
3           client in connection with a judicial proceeding, the  
4           profession as a whole suffers, and mounting public  
            criticism of lawyers is more difficult to defend.” (Ex. 1).

5           In that case, the State Bar concluded that the Defendant’s attorney  
6           violated A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, E.R. 3.1, E.R. 4.4  
7           and E.R. 8.4(d), and went on to informally reprimand Defendant’s attorney  
8           ordering him to attend an “Ethics enhancement Program” (Ex. 2).

9           **2. Misrepresents the findings of the Appeal Court on A.R.S. § 12-349**

10          The Defendant’s attorney misrepresents the Court of Appeals opinion. As  
11          clearly demonstrated by the language of the opinion. The Court of Appeals  
12          found, a) the superior court made no findings under A.R.S. § 12-350 to support  
13          an award under A.R.S. § 12-349, b) the Court of Appeals vacated the award of  
14          attorney fees. The Court of Appeals did not remand this matter of attorneys’  
15          fees award to the superior court to determine. The Defendant’s attorneys  
16          deliberately misrepresent the Court of Appeals’ opinion.

17          **3. Misrepresents *A.H. v. Arizona Property and Cas. Ins* findings on  
18          A.R.S. § 12-341.1**

19          The Defendant’s attorney intentionally misrepresents the court’s opinion in  
20          *A.H. v. Arizona Property and Cas. Ins* 190 Ariz. 526 (Ariz. 1997), 950 P.2d 1147<sup>1</sup>  
21          supports an award of attorneys’ fees under A.R.S. § 12-341.1. A.H. was about a  
22          claim under an insurance policy, which is a contract, against a fund that  
23          replaced the insolvent insurer pursuant to a statute. The court found that the  
24          provisions of statute to be a clause of the insurance contract, which continues to  
25          be the basis and source of the claim (*ID*).

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26          <sup>1</sup> The Defendant’s attorneys reply (p.6:5-7) quotes “In *A.H.*, “our supreme court  
27          held that an action arises out of contract for purposes of § 12-341.01 when a  
28          statutory obligation is imputed as part of the parties’ contract.” 190 Ariz. at 530.  
            However, no such quote exists in *A.H.*

1 To misrepresent A.H. in that way cannot be anything but an attempt to  
2 mislead the Court. This case is based solely on A.R.S. § 33-1243.D. The  
3 Declaration does not have any provision about an adoption or amendment of a  
4 budget. It does not address the budget issue at all, and, therefore, cannot be  
5 the basis for a claim arising out of contract.

6 The Defendant's attorney deliberately misrepresents the Brown case. The  
7 Brown case clearly supports the Plaintiff's argument that the Plaintiffs' claim did  
8 not arise out of contract. Plaintiff's claim regarding the adoption and  
9 amendment of the budget are only provided in A.R.S. § 33-1243.D which is the  
10 only source for the obligation of the HOA to adopt or amend its budget.

11 **4. Misrepresents *McDowell Mt. Ranch Commt. Ass'n v. Simons*, 216 Ariz.  
12 266, 267, ¶ 1, 165 P.3d 667, 668 (App. 2007)**

13 In his reply Defendant's attorneys argues "Therefore, a contempt dispute  
14 concerning budgetary obligations as resolved by interpretation of § 33-1243(D) is  
15 one that arises from contract. See *McDowell Mt. Ranch Commt. Ass'n v.*  
16 *Simons...*" (p.6:24-26). McDowell has nothing to do whatsoever with "budgetary  
17 obligations" and does not even mention A.R.S. § 33-1243.D, or any provision  
18 similar to that. McDowell was about enforcement of a provision in a contract  
19 (CC&Rs) which obligated Simons to build the improvements on his lot as required  
20 by the CC&Rs and has nothing to do statutory compliance. Defendant's attorney  
21 purposely and wrongfully misleads the Court by wrongly referencing McDowell, as  
22 a supportive case for their improper application of A.R.S § 12-341.01.

23 **CONCLUSION-**

24 The Defendant did not dispute the Plaintiff's arguments and motion for an  
25 alternative form of judgment and request for sanctions. Accordingly, the  
26 Defendant's form of judgment should be rejected, and the undisputed Plaintiff's  
27 proposed form of judgment should be adopted.

28 Because of their repeated misrepresentations and pattern of misconduct

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the Court should sanction the Defendant's attorneys as it deems appropriate and make a referral to the State Bar.

Dated this 27<sup>th</sup> day of September 2019.



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R. L. Whitmer

ORIGINAL filed this  
27<sup>th</sup> day of September 2019,  
with the Court;

and a COPY mailed this same date to:

Augustus Shaw  
Shaw & Lines Law Firm  
4523 E. Broadway Rd.  
Phoenix, AZ 85040

# Exhibit 1

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-015360

05/09/2006

HONORABLE PETER SWANN

CLERK OF THE COURT  
D. Kenney  
Deputy

FILED: 05/12/2006

NORTH CANYON RANCH OWNERS  
ASSOCIATION

AUGUSTUS H SHAW IV

v.

STACY K MOBBS

STACY K MOBBS  
23650 N 36TH DR  
GLENDALE AZ 85310

MARK E LINES  
RICHARD E CHAMBLISS  
ALTERNATIVE DISPUTE  
RESOLUTION - CCC  
STATE BAR OF ARIZONA

MINUTE ENTRY

10:02 a.m. This is the time set for Status Conference. Plaintiff is represented by counsel, Mark Lines. Defendant is present on her own behalf.

Court reporter, Judie Bryant, is present.

Discussion is held.

LET THE RECORD REFLECT that Plaintiff's counsel is advised that no attorney's fees will be awarded in this case, based upon the Court's earlier ruling on plaintiff's Motion for Summary Judgment and its concern over counsel's subsequent conduct.

The Court notes its disappointment regarding the professional conduct of Mr. Shaw in this matter. This is a small case – exclusive of fees and interest, the amount sought to be collected was less than \$400.00. Though the Court has previously agreed that Plaintiff would have been entitled to summary judgment on the principal amount due, the Motion for Summary Judgment is denied.  
Docket Code 089

Form V000A

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-015360

05/09/2006

Judgment was unaccompanied by a statement of facts or evidence that would have permitted calculation of that amount.<sup>1</sup> Had the Motion been prepared in a manner consistent with Rule 56(c), this matter could have been resolved efficiently. Had Mr. Shaw presented Ms. Mobbs with accurate billing records, a motion would likely not have been required at all. Indeed, Ms. Mobbs has indicated her willingness to stipulate to judgment in the amount due, and she has attempted in good faith to pay far more than that amount simply to dispose of this litigation. [Plaintiff's Reply in Support of Motion for Summary Judgment, at 3] Sadly, however, this case has become an example of the risk to the public of abusive litigation practices run amok. The Court is simply a forum for the resolution of disputes, not a weapon to be used to generate leveraged fee awards.

After the Court indicated that there would likely be no award of fees in this case, Defendant was billed approximately \$6,000 for Plaintiff's fees. Though this billing was retracted after Ms. Mobbs brought the matter to the Court's attention, Mr. Shaw continued to demand that she "settle" the case for \$2,000.00 – more than 400% of the amount actually owed. Coupled with this monetary demand (which counsel could not justify at today's hearing) was a demand that Defendant drop complaints that she had filed with the State Bar of Arizona against Mr. Shaw and with the State Board of Accountancy against a member of the Association. The Court is not privy to the contents of these complaints and expresses no view on their merit. But the use of a threat of continued litigation in an attempt to dispense with possible disciplinary proceedings is highly inappropriate.

The Court specifically noted to Mr. Shaw at the March 10, 2006 hearing the unlikelihood of any award of fees being entered in this matter and admonished Mr. Shaw of the same in the Court's minute entry dated April 6, 2006. Although the Court recognizes its obligation to award reasonable attorney's fees when warranted in cases such as this, it is the Court's view that no award of attorney's fees would be reasonable in this matter and that any fees incurred would be outweighed by an award of damages to Ms. Mobbs pursuant to A.R.S. § 12-349. Mr. Line's citation in open court of *Heritage Heights Homeowners Ass'n. v. Esser*, 115 Ariz. 330 (Ct. App. 1977), for the proposition that the Court is required to award fees regardless of their disproportionality to the amount in controversy is unavailing. The contractual language at issue in that case required an award of "all attorneys' fees and costs." Here, both the contract and the statute require an award of "reasonable" fees, and counsel conceded in open court that the determination of reasonableness is one for the Court.

Compounding the Court's concern is Mr. Shaw's filing of a plainly frivolous motion – purportedly pursuant to ER 4.2 -- to prohibit Ms. Mobbs from contacting her own homeowner's association regarding this matter. As a nonlawyer, Ms. Mobbs is not bound to the strictures of

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<sup>1</sup> To the extent that there might be other amounts due, such as late fees and other fines to support the \$1,479 lien, the motion was not accompanied by evidence that substantiated or explained such liabilities. At today's status conference, counsel conceded that "a final determination of the amounts chargeable pursuant to the governing documents" has still not yet been made – despite the filing of the Motion for Summary Judgment months earlier.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-015360

05/09/2006

ER 4.2. The Court has also reviewed Mr. Shaw's March 21, 2006 correspondence to Ms. Mobbs in this regard, and finds it to be abusive and inconsistent with the fundamental principles of professionalism sought to be advanced by the Supreme Court and the State Bar.<sup>2</sup> Lawyers should perform their function with the dignity rightly expected of officers of the Court. When a lawyer communicates in such fashion while representing a client in connection with a judicial proceeding, the profession as a whole suffers, and mounting public criticism of lawyers is more difficult to defend.

IT IS ORDERED endorsing this minute entry to the State Bar of Arizona.

IT IS FURTHER ORDERED vacating the appointment of Judge *Pro Tempore* Richard Chambliss in this matter.

IT IS FURTHER ORDERED setting a Bench Trial on **May 15, 2006 at 10:45 a.m. (30 minutes)** before:

**HONORABLE PETER B. SWANN  
MARICOPA COUNTY SUPERIOR COURT  
OLD COURT HOUSE  
125 W. WASHINGTON  
2<sup>nd</sup> FLOOR, COURTROOM 202  
PHOENIX, AZ 85003  
602-506-7959 TEL  
602-372-8545 FAX**

THIS IS A FIRM TRIAL SETTING.

The Court further notes that Plaintiff may submit a stipulated form of Judgment containing an accounting of unpaid assessments and interest collected thereon prior to trial. Upon approval of the proposed Judgment, the Court shall vacate the trial.

10:37 a.m. Hearing concludes.

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<sup>2</sup> The correspondence began:

Ms. Mobbs:

I HAVE WARNED YOU TIME AND TIME AGAIN NOT TO CONTACT THE BOARD OF DIRECTORS. YOU ARE NOT THE ASSOCIATION'S ATTORNEY AND MUST REFRAIN FROM GIVING THE ASSOCIATION ADVICE. SINCE YOU DO NOT SEEM TO UNDERSTAND THIS, I WILL SAY IT AGAIN. IF YOU CONTACT THE ASSOCIATION WITHOUT FIRST CONTACTING ME ONE MORE TIME. [sic] I WILL FILE A MOTION WITH THE COURT TO REQUEST THAT YOU BE CENSORED. ALL COMMUNICATION GOES THROUGH ME AND THEN I WILL PRESENT IT TO THE ASSOCIATION.

(Emphasis in original).

Docket Code 089

Form V000A

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# Exhibit 2

**BEFORE THE PROBABLE CAUSE PANELIST  
OF THE STATE BAR OF ARIZONA**

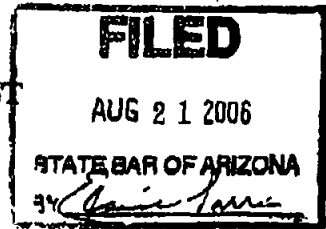
**IN THE MATTER OF A MEMBER  
OF THE STATE BAR OF ARIZONA,**

**AUGUSTUS H. SHAW, IV,  
Bar No. 021593**

**Respondent.**

No. 05-2176  
(Stacy K. Mobbs)

**ORDER OF INFORMAL  
REPRIMAND, PROBATION  
(EEP) AND COSTS**



The undersigned Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 54(b), Ariz.R.S.Ct., finds that probable cause exists to believe that Respondent has violated Rule 42, Ariz.R.S.Ct., to wit:

Respondent violated Rule 42, Ariz.R.S.Ct., ER 3.1 when he filed a motion to enforce the Rules of Professional Conduct against a non-lawyer pro per litigant. Furthermore, Respondent's written communications to the pro per litigant directing her to cease contacting Respondent's client were abusive and unprofessional in violation of Rule 42, Ariz.R.S.Ct., ER 4.4. Respondent's refusal to accept a settlement agreement reached between the opposing pro per litigant and an agent of his client, and Respondent's subsequent improperly presented challenge of that settlement in court, caused significant additional litigation and thus was prejudicial to the administration of justice, in violation of Rule 42, Ariz.R.S.Ct., ER 8.4(d).

**IT IS THEREFORE ORDERED that:**

(1) Pursuant to Rules 54(b) and 60(a)4, Ariz.R.S.Ct., Respondent is informally reprimanded for such conduct.

(2) Pursuant to Rules 54(b) and 60(a)5, Ariz.R.S.Ct., Respondent is hereby placed on probation for a period of one year under the following terms and conditions:

(a) Respondent shall attend a one-day Ethics Enhancement Program. Respondent must contact the Program Coordinator, at (602) 340-7241, within 20 days from the date this order is mailed;

(b) Respondent shall have a practice monitor. Respondent shall contact the Law Office Management Assistance Program (LOMAP) director (602) 340-7313 within 20 days from the date this order is mailed to initiate the selection of a practice monitor and preparation of a probation contract. Respondent shall enter into a probation contract and comply with all terms contained therein;

(c) Respondent shall obtain and view the following CLE self-study materials from the State Bar of Arizona's CLE department (602) 340-7325, within 20 days from the date this order is mailed: "Recovering Attorney's Fees in Arizona"; "Ethics for Trial Lawyers", and "Pretrial Motions" Respondent shall provide bar counsel with handwritten notes demonstrating that Respondent has viewed the above-referenced CLE materials;

(d) If Respondent fails to comply with the foregoing conditions within 20 days from the date this order is mailed this order will then be vacated and an Order of Probable Cause shall be entered pursuant to Rule 54(b)5, Ariz.R.S.Ct.

(3) Pursuant to Rule 54(b)(5), Ariz.R.S.Ct., within 10 days of service of this order, Respondent has the right to demand that a formal proceeding be instituted, whereupon this order will be vacated and an Order of Probable Cause will be issued directing bar counsel to prepare and file a formal Complaint concerning this matter pursuant to Rule 57(a), Ariz.R.S.Ct. Respondent must lodge any demand for formal proceedings with assigned bar counsel.

(4) Pursuant to Rules 48(k)3 and 60(a)4, this order will be entered in the Respondent's permanent record at the State Bar and, pursuant to Rule 70(a)2, is not confidential. It may also be considered by a hearing officer, the Disciplinary Commission or the Supreme Court in recommending or imposing discipline in a subsequent disciplinary proceeding against Respondent.

**IT IS FURTHER ORDERED**, pursuant to Rule 60(b), Ariz.R.S.Ct., that Respondent shall pay the costs and expenses of these proceedings, as set forth in the attached Statement of Costs and Expenses, within thirty (30) days of receipt of this order.

**IT IS FURTHER ORDERED** that Respondent shall be responsible for the enrollment charge of \$400.00 for attending the Ethics Enhancement Program, and all charges associated with the CLE self-study materials.

DATED this 16<sup>th</sup> day of August, 2006.

Steven P. Sherick  
Probable Cause Panelist  
State Bar of Arizona  
Steven P. Sherick

Copy was mailed by regular first class mail and by certified mail this 22<sup>nd</sup> day of August, 2006, to:

Augustus H. Shaw  
The Shaw Law Firm  
7551 S. Willow Drive - Suite 101  
Tempe, AZ 85283-0001  
Respondent

7005 2570 0001 0669 1807

Copy was hand-delivered this 22<sup>nd</sup> day of August, 2006, to:

Cathy McNeelege, EEP Program Coordinator  
State Bar of Arizona  
4201 N. 24<sup>th</sup> St., Suite 200  
Phoenix, Arizona 85016-6288

Lawyer Regulation Records Manager  
State Bar of Arizona  
4201 N. 24<sup>th</sup> St., Suite 200  
Phoenix, Arizona 85016-6288

by: S. Williams  
AW:sg

**Statement of Costs and Expenses**

In the Matter of a Member of the State Bar of Arizona,  
Augustus H. Shaw, Bar No. 021593, Respondent

File No(s). 05-2176

**Administrative Expenses**

The Board of Governors of the State Bar of Arizona has adopted a schedule of administrative expenses to be assessed in disciplinary proceedings. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. An additional fee of 20% of the administrative expenses is also assessed for each separate matter over and above five (5) matters due to the extra expense incurred for the investigation of numerous charges.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.


*General Administrative Expenses for above-numbered proceedings* = \$300.00

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

**Staff Investigator/Miscellaneous Charges**

Total for staff investigator charges \$0.00

**TOTAL COSTS AND EXPENSES INCURRED** **\$300.00**

  
Sandra E. Montoya  
Lawyer Regulation Records Manager

8-15-06  
Date