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9 *Attorneys for Defendants*

10  
11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF YAVAPAI**

13 TALKING ROCK LAND, LLC, an  
Arizona limited liability company,  
14 Plaintiff,

15 v.

16 INSCRIPTION CANYON RANCH  
SANITARY DISTRICT, an Arizona  
17 sanitary district; DAVID BARREIRA,  
District Board Member; BILL DICKRELL,  
18 District Board Member; and AL  
19 POSKANZER, District Board Member<sup>1</sup>,

20 Defendants.

Case No. P1300CV201800380

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

**(The Honorable John D. Napper)**

21  
22  
23  
24  
25 <sup>1</sup> This lawsuit is an official capacity suit and only pleads an action against the entity, irrespective of naming the individual board members. *Carrillo v. State*, 169 Ariz. 126, 129, 817 P.2d 493, 496 (Ct. App. 1991).

1 Defendants INSCRIPTION CANYON RANCH SANITARY DISTRICT (“ICRS”), an  
2 Arizona sanitary district; DAVID BARREIRA, District Board Member; and BILL DICKRELL,  
3 District Board Member; (hereinafter collectively “the District”), by and through undersigned  
4 counsel, herewith submit this Response to Plaintiff’s Application for Attorneys’ Fees and Costs  
5 (the “Application”). The District objects to all of the requested fees and costs as unreasonable  
6 because the District had no duty to act prior to receipt of the revised Plans and revised Water  
7 Quality Report, and the District executed the capacity assurance forms in the time provided by  
8 the parties’ Development Agreement. Thus, the Court should award \$0.00 to Plaintiff.  
9

10 In the alternative, the District makes specific objections to the hourly rates and the hours  
11 sought as unreasonable as argued fully below, for a total reasonable fee award of \$29,656.50.  
12

13 As a prefatory matter, Defendant Al Poskanzer moved out of the District, reregistered to  
14 vote and voted in the November 6, 2018 General Election, thereby vacating his office. A.R.S.  
15 § 38-291(5); *Kauzlarich v. Bd. of Trustees of Oak Creek Sch. Dist. No. 16, Yavapai County*, 78  
16 Ariz. 267, 271, 278, P.2d 888, 891 (1955).

17 Since Mr. Poskanzer was a defendant only in his representative capacity, we urge the  
18 Court, in considering this motion, to separately dismiss this case as to Mr. Poskanzer because,  
19 as to him, the Court no longer has personal jurisdiction as to him in his representative capacity.  
20 A.R.Civ.P. Rule 25(d). There can be no substitute joined at this time until the vacancy is filled  
21 by the Board. A.R.S. § 48-2010(f).  
22

23 **I. ARS § 48-2033 DOES NOT PERMIT THE INSTANT FEE AWARD**

24 The provision in A.R.S. Section 48-2033 permitting an award of attorneys’ fees  
25 contemplates an award “to the prevailing party” in an action brought by a “landowner aggrieved

1 by a sanitary district's adoption of a moratorium pursuant to this Section..." Clearly, the  
2 Complaint does not allege that the District followed that course. Rather, it alleges that the  
3 District created a "de facto" moratorium but only asks for declaratory relief, not a writ of  
4 prohibition or writ of mandamus typical of this type of special action.

5         Assuming, *arguendo*, that the statute can be read to cover the allegations in the  
6 Complaint, and assuming that the June 19th hearing on the Order to Show Cause can be equated  
7 to a "trial de novo", Plaintiff still does not meet the test of prevailing party because, as the  
8 record of that hearing discussed hereafter shows, the Plaintiff failed until after that hearing to get  
9 the revised Water Quality Report to the Defendants, which report was admittedly an essential  
10 document without which the Defendants had no duty to proceed.

11  
12         Thus, to the extent that the statute can be said to contemplate an award of attorney's fees  
13 in this proceeding, there can be no doubt that the Defendants are the prevailing parties, the  
14 Plaintiff having taken nothing from its flawed Complaint now obviously rendered moot by the  
15 Defendants proper action, without Court order, once the Plaintiff, only on June 19, acquitted its  
16 responsibility as an applicant.

17  
18         **II. DISTRICT WAS NOT OBLIGATED TO IDENTIFY ALL OF ITS DEFENSES**  
19         **PRIOR TO TRIAL**

20         A party cannot be forced to elect before the conclusion of trial the theory it will advance  
21 or the remedy it will seek. *Vinson v. Marton & Associates*, 764 P.2d 736, 159 Ariz. 1 (Ariz.  
22 App., 1988). The policy behind this rule is to allow the pleading party to take advantage of any  
23 possible development in the evidence which would show him to be entitled to recovery and thus  
24 prevent his being forced to elect in advance and at his peril which theory he will proceed upon.  
25

1 *Edward Greenband Enterprises of Arizona v. Pepper*, 538 P.2d 389, 112 Ariz. 115 (Ariz.,  
2 1975).

3 The purpose of an evidentiary hearing is to determine what the facts actually are. Despite  
4 Plaintiff's repeated avowals that it had submitted the necessary information to the District, the  
5 evidence adduced at trial proved that this simply was not true. As a result, Plaintiff was not  
6 entitled to declaratory relief at that time.

7  
8 The fee award violates the principle set forth in *Vinson v. Marton & Associates*, above,  
9 because it was granted on the basis that one of the District's trial theories was incorrect, even  
10 though the District prevailed on the ultimate issue of whether Plaintiff was entitled to  
11 declaratory relief at the conclusion of the order to show cause hearing.

12 The District objects to all of the requested fees on this ground.

13  
14 **III. ALL REQUESTED FEES UNREASONABLE BECAUSE NO DUTY TO ACT**

15 **a. District had no duty to act prior to receipt of the revised Plans pursuant to**  
16 **the review schedule specified in the parties' Development Agreement.**

17 All of the requested fees and costs are unreasonable because the District timely complied  
18 with its legal obligations with respect to the capacity assurance forms. Specifically, the District  
19 had no duty to act prior to receipt of the revised Water Quality Report. The Development  
20 Agreement, admitted into evidence as **Exhibit 20**, provides:

21 All plans and specifications shall be submitted to District and its engineers  
22 at the same time as said plans and specifications (the "Plans") are submitted  
23 to Yavapai County for review and approval together with a copy of the  
24 subdivision plat for the Developer Property and drawings depicting the  
infrastructure improvements for the subdivision (the "Joint Submittal").

25 ...

[T]he time period District has to fully review, identify changes requested  
and/or approve the Plans shall be... ten (10) calendar days following

1 Yavapai County review if County review exceeds thirty (30) days and  
2 changes are made by the County to the Plans. In the event the District has  
3 not fully reviewed and approved the Plans by the end of the District Review  
4 Period, the Developer shall provide written notice to the District requesting  
5 completion within ten (10) days. If the District has not completed its review  
6 and approval following the ten (10) day period, the Plans shall be deemed  
7 fully approved by District. *Ex. 20* at pg. 4 ¶ c.

8 Therefore, pursuant to the Development Agreement and A.R.S. § 48-2033(G)(2)(b), the  
9 District had no contractual duty to act prior to receipt of the revised Plans and revised Water  
10 Quality Report. Pursuant to contract, the District timely executed the capacity assurance forms.

11 **b. District executed the forms within the time provided by contract.**

12 At the June 19<sup>th</sup> evidentiary hearing, Plaintiff maintained that it had submitted all of the  
13 necessary supplemental information:

14 SEAN HOOD: Okay, and turn to Page 2 of that document. There's  
15 some supplemental information referenced there. Do you see that?

16 DAVIN BENNER: Yes, I do.

17 SEAN HOOD: Has all that information been provided to the  
18 District?

19 DAVIN BENNER: At this point, yes.  
*Hearing Tr. 44:3-9, June 19, 2018.*

20 However, the Plaintiff was proven incorrect on this evidentiary issue. It was discovered  
21 through cross-examination questioning that Yavapai County had required changes to the Water  
22 Quality Report, but that Plaintiff had not delivered the revised Water Quality Report to the  
23 District. *Hearing Tr. 60:7-10, June 19, 2018.* The District received the revised Water Quality  
24 Report pursuant to Court order later that day. *Hearing Tr. 160:15-161:11, June 19, 2018.* After  
25

1 receipt of the necessary information, the District's engineer reviewed that information and  
2 provided expert guidance to the District. On July 9, 2018, exactly 20 days after receipt of the  
3 revised Water Quality Report, the District approved and executed the capacity assurance forms.  
4 *Hearing Tr.* 6:14-15, July 10, 2018; Exhibit 64.

5 **c. No duty to act under the law.**

6 Whether the District had a duty to act imposed by law is governed by the doctrine of  
7 mandamus. Mandamus may compel the performance of a ministerial duty or compel the officer  
8 to act in a matter involving discretion. *Kahn v. Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124,  
9 1127 (Ct. App. 1995). Mandamus is not available compel an officer to perform acts not  
10 authorized or required by some plain provision of the law. *Id.*

11 Here, the District's statutory duty to review the forms was not triggered until Plaintiff  
12 submitted the revised Water Quality Report, which occurred *after* the evidentiary hearing on  
13 June 19, 2018. Az.Admin.Code R18-9-E301(C)(1-8) (An applicant shall submit the following  
14 information...Design documents, including plans, specifications, drawings, reports, and  
15 calculations); A.R.S. § 48-2033(G)(2)(b) (Moratorium does not include denial or delay of  
16 permits or authorizations because they are inconsistent with applicable statutes, rules or  
17 ordinances). Moreover, the District properly exercised its discretion in how it reviewed the  
18 forms.  
19  
20  
21

22 Had the District executed the forms prior to receipt of the revised supplemental  
23 information, it would have been liable to aggrieved persons.  
24  
25

1 Thus, there was no moratorium because the District timely complied with its obligations  
2 under the Development Agreement and the applicable laws and regulations. Therefore,  
3 Defendant objects to all of the requested fees and costs as being unreasonable.

#### 4 **IV. HOURLY RATES SOUGHT ARE UNREASONABLE**

5 As set forth in *China Doll*, the actual billing rates charged by Plaintiff's counsel are  
6 merely "[t]he beginning point in a development of a reasonable fee... While it is unlikely that the  
7 court will adjust the hourly rate upward, upon the presentation of an opposing affidavit setting  
8 forth reasons why the hourly billing rate is unreasonable, the court may utilize a lesser rate."  
9 *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (Ct. App. 1983).  
10

11 The District submits herewith as **Exhibit A** the Affidavit of L. Richard Mabery testifying  
12 to the reasonable and prevailing hourly rates in the community for this type of litigation. Mr.  
13 Mabery further identifies specific tasks where the hours sought are unreasonable.  
14

15 The District submits herewith as **Exhibit B** the Affidavit of Milton W. Hathaway, Jr.  
16 testifying to the reasonable and prevailing hourly rates for the community for this type of  
17 litigation. Mr. Hathaway further identifies specific tasks where the hours sought are  
18 unreasonable.  
19

20 The District objects to the hourly rates sought on the basis that the rates are unreasonable  
21 and exceed the prevailing hourly rates in the community. The reasonable and prevailing  
22 maximum hourly rates in the community are:

23 **Lead attorney: \$325.00 per hour.** *Hathaway Affidavit* ¶ 14 (maximum rate is  
24 \$325/hr); *Mabery Affidavit* ¶ 9 (prevailing rates are \$265-\$340/hr).

25 **Paralegal: \$105.00 per hour.** *Hathaway Affidavit* ¶ 14 (maximum paralegal rate  
is \$105/hr; *Mabery Affidavit* ¶ 9 (prevailing paralegal rates are \$85-\$150/hr).

1 Thus, Ms. Meidinger’s rate should be reduced from \$445 per hour to \$325 per hour; Mr.  
 2 Hood’s rate should be reduced from \$425 per hour to \$325 per hour; and paralegal time should  
 3 be reduced from \$230 per hour to \$105 per hour.  
 4

5 **V. AMOUNT OF HOURS CLAIMED IS UNREASONABLE**

6 The District objects to the hours claimed preparing for and conducting the evidentiary  
 7 hearing on the basis that the hours are unreasonable and inordinate. *Schweiger v. China Doll*  
 8 *Rest., Inc.*, 138 Ariz. 183 (Ct. App. 1983) (“If a particular task takes an attorney an inordinate  
 9 amount of time, the losing party ought not be required to pay for that time”).  
 10

11 The District objects to the following tasks on the ground that the hours claimed are  
 12 unreasonable, excessive, and inordinate for the task:

<b>Task</b>	<b>Table</b>	<b>Hours sought by Plaintiff</b>	<b>Reasonable hours</b>	<b>Reduce total hours awarded by:</b>
Double-billed Client Communications	A	12.4	6.2	6.2
Case Strategy	B	6.8	0	6.8
Response to Motion to Vacate	C	21.4	5	16.4
Review of Documents	D	15.7	8	7.7
Attorney Fee Application & Taylor Burgoon hours	Addressed separately.			
		<b>Total reduction to Attorney Hours:</b>		<b>37.1 hrs</b>



Paralegal Tasks	Table	Hours sought by Plaintiff	Reasonable hours	Reduce total hours awarded by:
Paralegal Time on Preparation of Exhibits	E	22.3	10	12.3 hrs
		<b>Total Reduction to Paralegal Hours:</b>		<b>12.3 hrs</b>

OBJECTIONS:

1. **Double-Billed Client Communications.** In listing the categories of tasks that constitute hours reasonably expended in the appeal, *China Doll* specifies that communication and correspondence with the client constitute hours reasonably expended “only if directly necessary and in furtherance of the appeal.” *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (Ct. App. 1983). Double-billed communications are unreasonable. *Mabery Affidavit*, ¶ 10(a), *Hathaway Affidavit* ¶ 15, 16.

Here, the District objects to the hours expended in **Table A**, attached hereto, totaling 12.4 hours, as being double-billed client communications. Additionally, client communications relating to case status and next steps are outside the scope of the fee award because these communications are not directly related to the evidentiary hearing. This should be reduced by 6.2 hours.

2. **Case Strategy.** The District objects to the Plaintiff claiming 6.8 hours for case strategy, shown in **Table B**, attached hereto, on the basis that the Order awarding attorney’s fees limits the fees to preparing for and conducting the evidentiary hearing. *Mabery Affidavit*, ¶ 10(e), *Hathaway Affidavit* ¶ 17. Case strategy is unrelated to the evidentiary hearing, limited to the factual issue of whether the plant had capacity. Moreover, the 1.0 hours billed by Mr. Hood on

1 June 19 after the evidentiary hearing for “work on strategy for next steps” is clearly outside the  
2 award. These hours sought should be reduced by 6.8 hours.

3 3. **Response to Motion to Vacate.** The District objects to the Plaintiff claiming 21.4 hours  
4 for responding to the motion to vacate, shown in **Table C**, attached hereto, on the basis that it is  
5 outside the scope of the attorney fee award granted in the Court’s Under Advisement Ruling and  
6 on the basis that the hours expended are unreasonable and outside the scope of the attorney fee  
7 award. *Mabery Affidavit*, ¶ 10(a), *Hathaway Affidavit* ¶ 20. This motion was summarily dealt  
8 with by the Court in a teleconference. If the Court awards fees, no more than 5 hours should be  
9 awarded as reasonable. This should be reduced by 16.4 hours.

11 4. **Review of Documents.** The District objects to the Plaintiff claiming 15.7 hours for  
12 reviewing documents, shown in **Table D**, attached hereto, on the basis that this is unreasonable  
13 amount of time expended. *Mabery Affidavit*, ¶ 10(a), *Hathaway Affidavit* ¶ 20. Due to block  
14 billing on these entries, it is impossible to ascertain whether these entries pertain to the  
15 evidentiary hearing. The hours sought for review of documents should be reduced by 7.7 hours.

17 5. **Paralegal Time Charged on Preparation of Exhibits.** The District objects to the  
18 Plaintiff claiming 22.3 hours for paralegal time preparing exhibits, as shown in **Table D**. This is  
19 an unreasonable amount of time expended preparing exhibits for a 1-day hearing. The time  
20 entries include block billings of 7.1 hours and 6.3 hours that make a determination of what the  
21 paralegal actually did impossible. *Mabery Affidavit*, ¶ 10(f). Reasonable paralegal hours for  
22 preparation of exhibits should be reduced by 12.3 hours.  
23  
24  
25

1           **TOTALS:** The District calculates that the total hours sought by Plaintiff for the  
2 time preparing for and conducting the evidentiary hearing are:

3           **Sean Hood:**           86.2 hours  
4           **Dawn Meidinger:** 38.5 hours  
5           **Paralegal:**           23.6 hours

6           The 124.7 hours sought for Mr. Hood and Ms. Meidinger's time preparing for and  
7 conducting the evidentiary hearing should be reduced by 37.1 hours, for a total of **87.6**  
8 **attorney hours** reasonably expended.

9           The 23.6 hours sought for paralegal time should be reduced by 12.3 hours, for a total  
10 of **11.3 paralegal hours** reasonably expended.

11  
12           **VI. HOURS SOUGHT FOR PREPARATION OF ATTORNEY FEE**  
13           **APPLICATION AND TAYLOR BURGOON HOURS**

14           The District objects to the 100.7 hours sought by Plaintiff for preparing the Application  
15 for Attorney's Fees and the supplemental Application for Attorney's Fees on the basis that it  
16 exceeds the scope of the fee award, which is limited to the time spent preparing for and  
17 conducting the evidentiary hearing. *Mabery Affidavit*, ¶10 (b); *Hathaway Affidavit* ¶ 19.

18           In the alternative, the District objects to the 100.7 hours sought as outrageous and  
19 unreasonable. *Mabery Affidavit*, ¶11 (the fees set forth in the Application are high than those  
20 usually and customarily charged or approved in civil litigation in Yavapai County for the  
21 services provided); *Mabery Affidavit*, ¶13 (Consideration was further given whether the  
22 attorneys' fees in this case are the tail wagging the dog, or if the attorneys' fees have become the  
23 dog, as referenced in *Pioneer Roofing Co. v. Mardian Const. Co.*, 152 Ariz. 455, 733 P.2d 652  
24 (App. 1986)).  
25

1 Much of the work involved in preparing a fee application is modification of form  
2 documents and form affidavits, and was therefore paralegal work quickly that should have been  
3 quickly and easily accomplished. The 100.7 hours sought is per se unreasonable.

4 Specific objections include:

- 5 • The entirety of the 66.5 hours sought for Plaintiff's 1<sup>st</sup> Application for Attorney's  
6 Fees should be disallowed as not related to preparing for the evidentiary hearing,  
7 and it was not the attorney fee award granted by the Court.
- 8 • Sean Hood: 12 hours block-billed on 9/11/18 for the oral argument on attorney's  
9 fees for a hearing that commenced at 3:59 p.m. and ended at 5:05 p.m. *Mabery*  
10 *Affidavit*, ¶10 (d)
- 11 • Sean Hood: 2.8 hours on 9/10/18 for reviewing briefs and preparing for oral  
12 argument on attorney's fees;
- 13 • The 24.2 hours sought for Plaintiff's 2<sup>nd</sup> Application for Attorney's Fees is  
14 unreasonable because most of the work had already been completed.
- 15 • Ubiquitous block billing by Ms. Burgoon and Mr. Hood for drafting and revising  
16 the attorney fee applications.
- 17 • 33.3 hours billed by Ms. Burgoon for is unreasonable, both because it is far too  
18 many hours expended on the task and because the work could have been  
19 performed by a legal assistant
- 20 • 26.1 hours billed by Mr. Hood in connection with the attorney fee application is  
21 unreasonable, both because it is far too many hours expended on the task and  
22  
23  
24  
25

because the work could have been performed by a legal assistant.

**Taylor Burgoon hours outside scope of award; Burgoon rate is unreasonable.** The District objects to the 33.3 hours sought for Taylor Burgoon’s time on preparing the Application for Attorney’s Fees and to the hourly rate sought of \$270/hour for a 1<sup>st</sup>-year associate’s time. Ms. Burgoon’s time is outside the scope of the award. *Mabery Affidavit*, ¶ 9 (prevailing range for associate attorneys is \$165-\$220/hour). If any hours are awarded for Ms. Burgoon’s time, her reasonable rate should be \$200/hour.

If the Court were to award any hours for preparing the attorney fee application, this should be limited to 10 hours of attorney time and 10 hours of paralegal time.

## VII. CONCLUSION

The District objects to all of the requested fees and costs as unreasonable because the District had no duty to act prior to receipt of the revised Plans, and the District executed the capacity assurance forms in the time provided by the parties’ Development Agreement.

IN THE ALTERNATIVE, the Court should find that Plaintiff’s reasonable rates and hours expended for this attorney fee award are:

Attorney time: 87.6 hours @ \$325/hr  
Paralegal time: 11.3 hours @ \$105/hr

	Hours sought by Plaintiff	Reductions to hours	Hours after reduction	Reasonable Rate	Total
Attorney hours (S. Hood) (D. Meidinger)	124.7 hours (86.2 – Hood) (38.5 Meidinger)	37.1	87.6	\$325/hr	\$28,470
Paralegal	23.6	12.3	11.3	\$105/hr	\$1,186.50
			<b>Total reasonable fee award:</b>		\$29,656.50

Therefore, the Court should award Plaintiff its reasonable attorney’s fees and costs in the amount of \$29,656.50.

1 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of December, 2018.

2  
3 ROBERT S. LYNCH & ASSOCIATES

4 /s/ Robert S. Lynch  
5 Robert S. Lynch  
6 Todd A. Dillard  
7 Hans Clugston  
8 Attorneys for Defendants

9 *Certificate of Service.* On 12/ 17 /18, the above document and its attachments, if any, were served as follows

10 ORIGINAL sent to:

11 Clerk of the Superior Court  Mail  
12  Via  
13 TurboCourt  
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FENNEMORE CRAIG, P.C.  Mail  
Sean Hood, Esq.; Dawn Meidinger, Esq.;  Via TurboCourt  
Taylor Burgoon, Esq.  Not Served  
2394 E. Camelback Road, Suite 600  
Phoenix, AZ 85016-3429

14 Copy sent to:

15 PRESCOTT LAW GROUP, PLC  Mail  
16 Andy Jolley, Esq.  Via  
116 N. Summit Avenue TurboCourt  
Prescott, AZ 86301  Facsimile  
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17 Under penalty of perjury, I certify the above Certificate of Service is true and correct.

18 /s/ Alyssa Osborn  
19 Signature

Alyssa Osborn \_\_\_\_\_  
Print Name

12/ 17 /18  
Date

## TABLE A

### Double-billed Client Communications

5/14/2018	Dawn Meidinger	Teleconference with client team to discuss next steps.	0.90	400.5
5/14/2018	Sean T. Hood	Consideration to case strategy and participate in status call with Messrs. Burger and Poteet. (1.0)	1.0	425
5/16/2018	Dawn Meidinger	Teleconference with Mr. Burger (.3); <del>teleconference with Mr. Lynch (.2)</del> ; prepare and send summary of call to client team (.3); teleconference with Mr. Burger (.4).	1.00	445
5/16/2018	Sean T. Hood	Participate in status update call with Mr. Burger (.3); exchange multiple related correspondence concerning case status and next steps (.7);	1.0	425
6/4/2018	Dawn Meidinger	Confer with S. Hood; T. Burgoon (.3); teleconference with Mr. Burger (.8); teleconference with Mr. Poteet (.2)	1.3	578.5
6/4/2018	Sean T. Hood	participate on client status update calls (.7)	.7	297.5
6/5/2018	Sean T. Hood	exchange multiple case status correspondence to Mr. Poteet (1.2)	1.2	510
6/6/2018	Dawn Meidinger	correspond with Mr. Poteet regarding (REDACTED) (.6)	.6	267
6/7/2018	Dawn Meidinger	Teleconference with Mr. Poteet et al. regarding witness list for hearing (.8); teleconference with Mr. Burger regarding affidavit (.3)	1.1	489.5
6/7/2018	Sean T. Hood	participate on separate conference calls with Messrs. Burger and Poteet concerning case status (1.4)	1.4	595
6/13/2018	Dawn Meidinger	Status conference, post—hearing discussion and teleconference with Mr. Poteet (1.3); teleconference with Mr. Burger (.3).	1.60	712
6/16/2018	Dawn Meidinger	Review correspondence from Mr. Burger and respond thereto (.2) teleconference with Mr. Poteet regarding (REDACTED) (.2).	.4	178
		TOTALS:	12.4 hrs	\$5,323

## TABLE B

### Consideration to Case Strategy

5/10/2018	Sean T. Hood	Consideration to strategy (.7)	.7	297.5
5/14/2018	Sean T. Hood	Consideration to case strategy and participate in status call with Messrs. Burger and Poteet.	1.00	425
5/17/2018	Sean T. Hood	consideration to case strategy (.4).	.4	170
5/29/2018	Sean T. Hood	Consideration to case strategy (.9)	.9	382.5
5/30/2018	Sean T. Hood	work on hearing strategy (1.8).	1.8	765
6/13/2018	Sean T. Hood	work on case strategy with D. Meidinger and Mr. Jolley (1.0)	1.0	425
6/19/2018	Sean T. Hood	work on strategy for next steps (1.0)	1.0	425
		TOTALS:	6.8	\$2,890.00

## TABLE C

### Response to Motion to Vacate

6/1/2018	Sean T. Hood	review motion to vacate and begin work on response (1).	1.0	\$1,487.50
6/2/2018	Sean T. Hood	Work on response to motion to vacate.	2.1	\$892.50
6/4/2018	Sean T. Hood	work on response to motion to vacate (.3)	.3	\$1,445.00
6/5/2018	Sean T. Hood	Work on response to motion to vacate (6.1), and work on revisions and additions to response (2.5).	6.1	\$5,142.50
6/6/2018	Dawn Meidinger	Review and edit Mr. Burger affidavit (.4) and response to motion to vacate (.6)	.6	\$845.50
6/6/2018	Sean T. Hood	Work on response to motion to vacate (3.8)	3.8	\$1,912.50
6/7/2018	Sean T. Hood	revise response in opposition to motion to vacate (1.1)	1.1	\$3,102.50
6/8/2018	Dawn Meidinger	Finalize witness and exhibit list and filing in response to motion to vacate (2.8)	2.8	\$1,290.50
6/8/2018	Sean T. Hood	exchange multiple internal correspondence concerning today's filings and case status (.8).	.8	\$1,317.50
6/13/2018	Dawn Meidinger	Status conference, post—hearing discussion and teleconference with Mr. Poteet (1.3)	1.3	\$845.50
6/13/2018	Sean T. Hood	Prepare for and participate in telephonic hearing on motion to vacate (1.5)	1.5	\$1,487.50
		TOTALS:	21.4	\$9,189.00

## TABLE D

### Review Documents

5/29/2018	Sean T. Hood	review operational documents concerning treatment plant capacity (.8).	.8	340
5/30/2018	Sean T. Hood	review operational documents and meeting minutes (1.2)	1.2	510
6/1/2018	Sean T. Hood	Review operational documents and wastewater treatment plant design documents in preparation for hearing (1.8)	1.8	765
6/5/2018	Sean T. Hood	review documents and work on exhibit list (2.3)	2.3	977.5
6/7/2018	Sean T. Hood	Review documents and work on exhibit list (3.4)	3.4	1445
6/8/2018	Sean T. Hood	Review multiple correspondence and documents transmitted by Mr. Lynch (1.2)	1.2	510
6/10/2018	Dawn Meidinger	Review Dec. 2017 data on (REDACTED) and send correspondence to Mr. Poteet (REDACTED).	1.30	552.5
6/18/2018	Sean T. Hood	review exhibits and revise witness outlines (3.7),	3.7	1572.5
			15.7	6672.5



## TABLE E

### Paralegal Exhibit Preparation Hours

6/4/2018	Valerie Godfrey	(Paralegal) Communications with 8. Hood regarding preparation of exhibits for evidentiary hearing.	0.30	69.00
6/6/2018	Valerie Godfrey	(Paralegal) Continue gathering and organize exhibits for evidentiary hearing; prepare draft index of exhibits.	2.00	460.00
6/7/2018	Valerie Godfrey	(Paralegal) Continue preparation of exhibits for evidentiary hearing and revise index to exhibits.	7.10	1,633.00
6/8/2018	Valerie Godfrey	(Paralegal) Communications with 8. Hood and D. Meidinger regarding additional exhibits; continue organization and preparation of exhibits for evidentiary hearing; revise and finalize index to hearing exhibits.	6.30	1,449.00
6/11/2018	Valerie Godfrey	[Paralegal] Preparation of hearing exhibits for opposing counsel and hearing exhibit binders for S. Hood and D. Meidinger.	1.90	437.00
6/13/2018	Valerie Godfrey	(Paralegal) Meet with 8. Hood regarding additional set of exhibits for witnesses and compilation of defendant's exhibits for hearing; preparation of plaintiff's exhibit binders.	1.40	322.00
6/14/2018	Valerie Godfrey	(Paralegal) Preparation of Defendant's exhibit binders for hearing.	1.10	253.00
6/15/2018	Valerie Godfrey	(Paralegal) Preparation of supplemental exhibits.	1.10	253.00
6/18/2018	Valerie Godfrey	(Paralegal) Communications with 8. Hood regarding preparation for conference call (.1); communications with local counsel regarding hearing exhibits (.5); create box.com account and upload hearing exhibits (.5).	1.10	253.00
		<b>TOTALS:</b>	<b>22.3</b>	<b>\$5,129.00</b>

1 EXHIBIT A

2  
3 L. Richard Mabery, Esq.  
4 LAW OFFICES OF L. RICHARD MABERY, P.C.  
5 234 North Montezuma Street  
6 Prescott, Arizona 86301  
7 ( 928 ) 778 - 1116  
8 [maberypc@cableone.net](mailto:maberypc@cableone.net)  
9 State Bar I.D. No. 005188

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

11 IN AND FOR THE COUNTY OF YAVAPAI

12 TALKING ROCK LAND, LLC, an	)	No. P1300CV201800380
13 Arizona limited liability company,	)	
	)	
14 Plaintiff,	)	
	)	
15 vs.	)	<b>DECLARATION OF</b>
	)	<b>L. RICHARD MABERY, ESQ.</b>
16 INSCRIPTION CANYON RANCH	)	
17 SANITARY DISTRICT, an Arizona	)	Div. 2
18 sanitary district, DAVID BARRIERA,	)	
19 District Board Member; BILL	)	Honorable John D. Napper
20 DICKRELL, District Board Member;	)	
21 AL POSKANZER, District Board Member,	)	
	)	
22 Defendants.	)	

23 L. Richard Mabery declares as follows:

- 24 1. I am an attorney practicing in Yavapai County since 1977.
- 25 2. I graduated from Arizona State University College of Law in 1977 and am admitted
- 26 to practice in Arizona State Courts, Federal District Courts of Arizona, and the 9<sup>th</sup>
- 27 Circuit Court of Appeals.
- 28

- 1 3. I am a sole practitioner with offices in Cottonwood and Prescott, Arizona. Previously  
2 I was a partner in the Law Offices of Walraven, Lange and Mabery, and a partner in  
3 the Law Offices of Mabery and Stadelman.  
4
- 5 4. My practice has primarily involved a general civil practice and represented over the  
6 past forty years various individuals, businesses, municipalities, and other quasi-  
7 governmental agencies or organizations.  
8
- 9 5. My practice includes litigation and transactional activities for both plaintiffs and  
10 defendants in various civil matters including matters involving state, county, probate,  
11 water, business, zoning, and governmental issues.  
12
- 13 6. In December of 2018, I was asked to review the Application for Attorneys' Fees and  
14 Costs submitted by Talking Rock Land, LLC's attorneys in Yavapai County Cause  
15 No. P1300CV201800380.  
16
- 17 7. I was provided thirty-five (35) separate pleadings, minute entries and exhibits as filed  
18 in the *Talking Rock Land, LLC v. Inscription Canyon Ranch Sanitary District* case  
19 (exceeding 450 pages) and which were pertinent to the Application submitted by the  
20 plaintiff in this matter, and three transcripts of hearings, June 19, 2018, July 10, 2018,  
21 and the June 20, 2018 Transcript of Corrections. My review included examination of  
22 the first Application for Fees and Costs submitted by the plaintiff on or about July 27,  
23 2018, and a second Application filed on or about November 26, 2018.  
24  
25
- 26 8. In the course of my practice, I have submitted or reviewed multiple fee applications  
27  
28

1 in primarily state court actions in Yavapai County, and fee applications submitted in  
2 the Arizona Court of Appeals.

3  
4 9. I am familiar with the range of customary fees charged in litigation in Yavapai County  
5 and believe that the prevailing customary range of hourly charges for qualified  
6 attorneys with experience in litigation and water matters in the Yavapai County  
7 Superior Court would range from \$265.00 an hour to \$340.00 an hour. For associate  
8 attorneys I believe the prevailing customary range would be in the \$165.00 an hour  
9 to \$220.00 an hour range, and for qualified paralegals the range would be in the  
10 \$85.00 an hour to \$150.00 an hour range. I have reviewed the Declaration and  
11 attached exhibits filed by Talking Rock Land, LLC's counsel in consideration of the  
12 holdings in *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927  
13 (App. 1983), and multiple cases following the *China Doll* holdings. I further  
14 reviewed the submitted information in regards to reasonableness of time and effect,  
15 quality of the services, extent of the services, and the prevailing rates of counsel in the  
16 community with comparable experience, ability, training, skill, and professional  
17 standing.

18  
19  
20  
21  
22 10. Declarant observed several areas of concern in the Application as submitted,  
23 including, but not limited to the following:

24 a. The Affidavit provides that 21.4 hours of attorney time were billed in  
25 preparing the response to vacate the Evidentiary Hearing. However, the Order  
26  
27

1 of the Court provided that the Application be limited to “the work performed  
2 by only two attorneys and one paralegal” for “actual time spent preparing for  
3 the evidentiary hearing and conducting the evidentiary hearing.”  
4

- 5 b. The second Application includes requests for attorneys’ fees for attorneys  
6 Taylor Burgoon and Sean T. Hood, and one paralegal, Valerie Godfrey, in  
7 preparing the second Application for Attorneys’ Fees, for a total of over 90.7  
8 hours and \$26,965.00 in fees.  
9
- 10 c. The primary second fee Application includes request for attorney fees for two  
11 attorneys, Sean Hood and Dawn Meidinger.  
12
- 13 d. In some of the actual entries of time made by the participating attorneys at the  
14 hearings, charges for travel time were included. For instance, the billing  
15 reflects twelve hours billed on September 11, 2018 to prepare, travel, and  
16 participate in the hearing that commenced at 3:59 p.m. and ended at 5:05 p.m.  
17
- 18 e. There are multiple references in the billing statements submitted regarding  
19 “consideration of case strategy.” It is unclear from the billings submitted if the  
20 “case strategy” considered was limited to the issues as directed by the Court,  
21 or included other claims or issues involved in the case, but not a part of the  
22 Evidentiary Hearing. From 5/10/2018 to 6/19/2018, Mr. Hood reflected a  
23 minimum of 6.8 hours in case strategy. (See time entries 5/10/2018,  
24 5/14/2018, 5/17/2018, 5/29/2018, 5/30/2018, 6/13/2018 and 6/19/2018.)  
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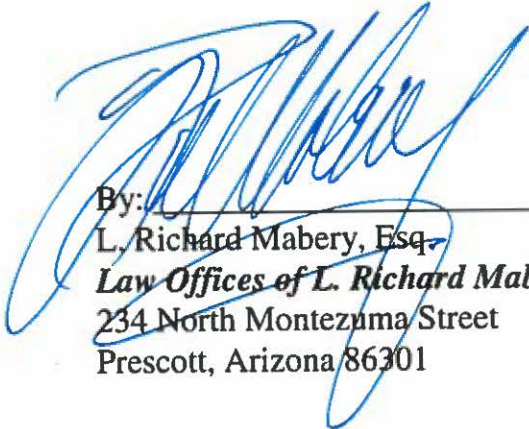
- 1 f. A number of the entries by paralegal Valerie Godfrey total over 22 hours of  
2 time, but appear to be preparation of exhibits for the Evidentiary Hearing, and  
3 some of the entries contain multiple actions with no ability to determine the  
4 efficiency of the time spent. (See entries 6/4/2018, 6/6/2018, 6/7/2018,  
5 6/8/2018, 6/11/2018, 6/13/2018, 6/14/2018, 6/15/2018, and 6/18/2018.)  
6  
7 g. In a similar vein, Mr. Hood shows a number of entries for a total of over 13  
8 hours of reviewing documents. (See entries 5/29/2018, 5/30/2018, 6/1/2018,  
9 6/5/2018, 6/7/2018, 6/18/2018). The documents reviewed are not set forth, and  
10 it is unclear if those are related to the limited scope of the Evidentiary Hearing.  
11  
12 h. Likewise, attorney Meidinger had an entry of 6/10/2018 creating an expense  
13 of \$552.00 referencing work on redacted information.  
14  
15 i. There are a number of billing entries by attorneys Hood and Meidinger  
16 reflecting communications with client and which do not indicate that those  
17 communications or the fees charged were limited to the issues as directed by  
18 this Court to be submitted in the Application. (See entries 5/14/2018,  
19 5/15/2018, 5/16/2018 (both counsel), 6/4/2018 (both counsel), 6/5/2018,  
20 6/6/2018, 6/7/2018 (both counsel), 6/13/2018 and 6/16/2018.)  
21  
22

23 11. Based upon the foregoing analysis, Declarant believes that the total of the fees set  
24 forth in the Application are higher than those usually and customarily charged or  
25 approved in civil litigation in Yavapai County for the services provided.  
26  
27  
28

- 1 12. Declarant has also reviewed the Statement of Costs submitted and it appears that the  
2 costs of service of various documents exceed the statutory rates set forth in A.R.S. §  
3 11-445, Section 7-204, *Arizona State Code of Judicial Administration*, and *Arizona*  
4 *Attorney General Opinions*.  
5  
6 13. Consideration was further given whether the attorneys' fees in this case are the tail  
7 wagging the dog, or if the attorneys' fees have become the dog, as referenced in  
8 *Pioneer Roofing Co. v. Mardian Const. Co.*, 152 Ariz. 455, 733 P.2d 652, (App.  
9 1986).  
10  
11 14. Pursuant to Rule 80(I), *Arizona Rules of Civil Procedure*, I declare under penalty of  
12 perjury that the foregoing is true and correct to the best of my knowledge,  
13 information, and belief.  
14

15  
16 DATED this 17th day of December, 2018.

17 **L. RICHARD MABERY, P.C.**

18  
19  
20  
21  
22 By:   
23 L. Richard Mabery, Esq.  
24 *Law Offices of L. Richard Mabery, P.C.*  
25 234 North Montezuma Street  
26 Prescott, Arizona 86301  
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EXHIBIT B

SUPERIOR COURT OF ARIZONA  
YAVAPAI COUNTY

TALKING ROCK LAND, LLC, an  
Arizona limited liability company,  
  
Plaintiff,  
  
v.  
  
INSCRIPTION CANYON RANCH  
SANITARY DISTRICT, an Arizona  
sanitary district; DAVID BARREIRA,  
District Board Member; BILL  
DICKRELL, District Board Member;  
AL POSKANZER, District Board  
Member,  
  
Defendants.

No. P1300CV201800380  
**AFFIDAVIT OF MILTON W.  
HATHAWAY, JR., ESQ.**  
  
**(Assigned to the Honorable John D. Napper)**

Milton W. Hathaway, Jr. being first duly sworn, deposes, and says:

1. I am an attorney licensed to practice law in the State of Arizona and I make this Affidavit based upon my personal knowledge and review of documents generated in the litigation referenced in this Affidavit caption as more fully described below.



1           2.     I am the managing member of Murphy, Schmitt, Hathaway, Wilson &  
2     Becke, P.L.L.C. I obtained my J.D. from the University of Arizona in 1978. My areas of  
3     practice encompass tort law, municipal liability (federal and state law issues),  
4     employment law, and litigation in connection with these areas.

5           3.     I am a past president of the Arizona Association of Defense Counsel and  
6     have served on the Arizona Supreme Court's Character and Fitness Committee, Ad Hoc  
7     Committee on Rules of Evidence and its Task Force of the Rules of Civil Procedure. I am  
8     presently a member of the Arizona Supreme Court's Advisory Committee on Rules of  
9     Evidence.

10          4.     I practiced in Phoenix, Arizona from 1978 until 1998 doing primarily  
11     insurance defense work. I had a sabbatical in Asia from 1998 until 2002. I began  
12     practicing in 2002 in Prescott, Arizona and my litigation practice since then has primarily  
13     involved cases in northern Arizona Superior Courts and the Prescott Division of the  
14     United States District Court for the District of Arizona.

15          5.     I have personally tried dozens of jury trials and have also tried a number of  
16     cases to the Court.

17          6.     I have been asked to provide opinions as to the reasonableness of the hourly  
18     rates for litigation related attorneys' fees and paralegal fees claim by the Plaintiffs in this  
19     case, whether charges for the work performed are reasonable and appropriate, and whether  
20     the charges appear to be within the scope of the Court's Order of November 9, 2018  
21     awarding fees to Plaintiff.

22          7.     In connection with the opinions I have been asked to provide, I have  
23     reviewed the following documents:

24                 a.    Motion to Vacate Order to Show Case Hearing dated June 1, 2018

25     ///

26

- 1                   b. Response in Opposition to Defendant's Motion to Vacate dated June 8,  
2                   2018  
3                   c. Minute Entry Order dated June 19, 2018  
4                   d. Minute Entry Order dated July 10, 2018  
5                   e. Plaintiff's Application for Attorneys' Fees and Costs dated July 27, 2018  
6                   f. Response to Plaintiff's Application for Attorneys' Fees and Costs dated  
7                   August 8, 2018  
8                   g. Reply in Support of Plaintiff Talk Rock Land, LLC's Application for  
9                   Attorneys' Fees and Costs dated August 17, 2018  
10                  h. Order Setting Oral Argument dated August 29, 2018  
11                  i. Order Under Advisement Ruling and Order dated November 9, 2018  
12                  j. Talking Rock Land, LLC's Application for Attorneys' Fees and Costs  
13                  dated November 26, 2018

14                                   **REASONABLENESS OF HOURLY RATES**

15                  8.       I am familiar with the customary and reasonable attorney billing rates in  
16                  Yavapai County for various types of litigation. A reasonable attorney billing rate in  
17                  Yavapai County for litigation is up to \$325 per hour for private paying clients, depending  
18                  on the knowledge and experience of the attorney, the complexity of the case and the client  
19                  relationship.

20                  9.       I am familiar with the customary and reasonable paralegal billing rates in  
21                  Yavapai County for various types of litigation. Reasonable paralegal billing rates in  
22                  Yavapai County for litigation is no more than \$105 per hour, depending on the complexity  
23                  of the case, for private paying clients.

24                  ///

25                  ///

26

1           10. I am aware that the various attorneys who have been involved defending this  
2 case have charged hourly rates of \$325 per hour, \$300 per hour, \$200 per hour, \$175 per  
3 hour and \$150 per hour.

4           11. I am aware that the paralegals involved in defending this case have charged  
5 \$100 per hour and \$95 per hour.

6           12. I am aware that the current application by Plaintiff's attorneys in this case  
7 demands attorneys' fees at the rates of \$445 per hour and \$425 per hour.

8           13. I am aware that the current application by Plaintiff's attorneys in this case  
9 demands paralegal fees at the rate of \$230 per hour, a charge that exceeds the rate charged  
10 by three of the attorneys defending the case.

11           14. It is my opinion that the rates claimed for attorneys' fees and paralegal fees  
12 in Plaintiff's current Application for Attorneys' Fees and Costs are unreasonable and that  
13 a reasonable rate for attorneys' fees would be no more than \$325 per hour and that a  
14 reasonable rate for paralegal fees would be no more than \$105 per hour.

15                   **REASONABLENESS OF TIME CLAIMED FOR WORK PERFORMED**

16           15. Based upon my experience, litigation clients are not customarily charged by  
17 multiple attorneys and/or paralegals for participating in inter-office conferences.  
18 Customarily only a single attorney or paralegal charges for such time.

19           16. Plaintiff's current Application for Attorneys' Fees and Costs includes  
20 numerous inter-office communications for which multiple charges have been submitted.  
21 (See, *e.g.*, time charges for 5-10-18, 6-5-18, 6-18-18, and 7-24-18). It is my opinion that  
22 these multiple charges are unreasonable.

23           17. Plaintiff's current Application for Attorneys' Fees and Costs includes  
24 approximately 10 hours for fees associated with "consideration to case strategy",  
25 "consideration to strategy" and "case strategy". Without a detailed description of what  
26

1 these charges are truly for I cannot determine whether these charges are reasonable based  
2 upon the vagueness of the description.

3 **WORK THAT APPEARS OUTSIDE THE SCOPE OF THE 11/09/2018 ORDER**

4 18. The Court's Order of 11/09/18 limits Plaintiff to applying for an award of  
5 fees to "the actual time spent preparing for the evidentiary hearing and conducting the  
6 evidentiary hearing."

7 19. It is my opinion that the Plaintiff's current Application for Attorneys' Fees  
8 and Costs exceeds the scope of the Court's limitations in that it makes claim for attorneys'  
9 fees and paralegal fees incurred for time spent other than "actual time spent preparing for  
10 the evidentiary hearing and conducting the evidentiary hearing."

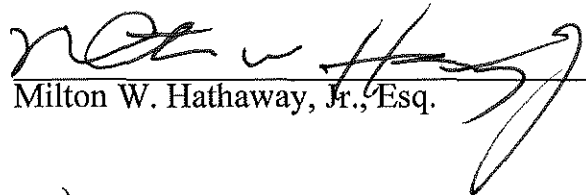
11 20. As an example, there are numerous charges for the preparation of Plaintiff's  
12 Response in Opposition to Defendant's Motion to Vacate Evidentiary Hearing and Order  
13 to Show Cause, research regarding same and preparation for the oral argument on same.  
14 (See, *e.g.*, time charges for 6-1-18, 6-2-18, 6-4-18, 6-5-18, 6-6-18, 6-7-18, 6-8-18 and  
15 6-13-18).

16 21. As another example, the charges claimed by Plaintiff include several  
17 charges for preparation of two Applications for fees. The Court's Order does not appear  
18 to allow recovery for these charges as they are not charges for "actual time spent  
19 preparing for the evidentiary hearing and conducting the evidentiary hearing." (See, *e.g.*,  
20 time charges for 7-10-18, 7-11-18, 7-12-18, 7-14-18, 7-15-18, 7-16-18, 7-18-18 and 7-19-  
21 18, 7-22-18, 7-23-18, 7-24-18, 7-27-18, 8-14-18, 8-16-18, 9-6-18, 9-7-18, 9-10-18, 9-11-  
22 18, 11-19-18, 11-20-18, 11-25-18 and 11-26-18).

23 22. Plaintiff is also apparently claiming charges for an anticipated Reply which  
24 also does not appear within the scope of the Court's Order granting fees.  
25  
26

1 23. Finally, the claim for attorneys' fees for more than two attorneys clearly  
2 appears to exceed the Court's order of 11-9-18.

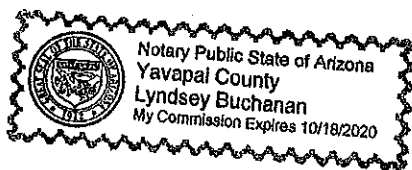
3 DATED this 17 day of December, 2018.

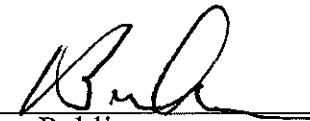
4  
5   
6 Milton W. Hathaway, Jr., Esq.

7 STATE OF ARIZONA )  
8 ) §§  
9 County of Yavapai )

10 On this, the 17<sup>th</sup> day of December, 2018, before me, the undersigned  
11 Notary Public, personally appeared Milton W. Hathaway, Jr., known to me or  
12 satisfactorily proven to me to be the person whose name is subscribed to the within  
13 instrument, and acknowledged to me that he executed this instrument for the purposes  
14 therein contained.

15 IN WITNESS WHEREOF I have hereunto set my hand and official seal.



  
Notary Public