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6 Attorney for Defendants Joseph A. Miner
7 and The JM Trust, Dated January 1, 2005

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF ORANGE**
10 **CENTRAL JUSTICE CENTER**

11 HUNTINGTON CONTINENTAL TOWN)
12 HOUSE ASSOCIATION, INC., a non-profit)
13 association,)
14 Plaintiff,)

15 v.)

16 THE JM TRUST, DATED JANUARY 1,)
17 2005, JOSEPH A. MINER TRUSTEE,)
18 and DOES 1 through 100, inclusive,)
19 Defendants.)

Case No. 30-2011-00466754
APPELLATE DIVISION
CASE NO. 30-2013-00623099

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR AWARD OF
ATTORNEY'S FEES
(Civil Code §§ 5975(c), 1717)

DATE: , 2015
TIME:
DEPT.:

20 **I. INTRODUCTION**

21 Plaintiff Huntington Continental Town House Association, Inc. (“Huntington”)
22 commenced this action on April 13, 2011 to foreclose on an assessment lien it had
23 recorded against property owned by defendants The JM Trust, Dated January 1, 2005 and
24 Joseph A. Miner (collectively “Miner”). In November and December of 2011 Miner sent
25 three checks to Huntington, in the amounts of \$188, \$188, and \$3,500, to pay off the
26 delinquent assessments. Huntington returned the checks to Miner stating that it could not
27 accept “partial payments.”
28

1 Huntington then prosecuted the foreclosure action through a court trial in
2 September 2012. Miner defended the action on the ground that he had tendered full
3 payment. The Court rejected this defense, found in favor of Huntington, and ordered
4 foreclosure.

5 Miner appealed. The Appellate Division reversed the judgment and held that
6 Huntington wrongfully rejected Miner's payments. At Huntington's request, the
7 Appellate Division certified the case for transfer to the Court of Appeal. That Court
8 accepted the transfer and, in an opinion published on October 14, 2014, also reversed and
9 held that Huntington had been required to accept Miner's payments. The Court
10 remanded and directed the trial court to enter judgment for Miner on Huntington's cause
11 of action for foreclosure.
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14 Civil Code § 5975(c) provides that the Court "*shall*" award attorney's fees to the
15 prevailing party. The party that achieved its "main litigation objective" "on a practical
16 level" is the prevailing party.
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18 Huntington's litigation objectives were to foreclose on its assessment lien and
19 establish its right to reject partial payments. Miner's objectives were to prevent
20 foreclosure and confirm the obligation of Huntington, and all other California
21 homeowner's associations, to accept partial payments of delinquent assessments.
22

23 Miner succeeded; Huntington did not. Miner thus is manifestly the prevailing
24 party in this action. The Court, therefore, must award him the attorney's fees he incurred.
25 Should the Court find that the prevailing party determination is premature Miner
26 requests, as alternative relief, that the Court at least award him the fees incurred for the
27 two appeals.
28

1 **II. FACTS¹**

2 Huntington is a common interest development governed by the Davis-Stirling
3 Common Interest Development Act, Civil Code §§ 4000, et seq. Through his trust Miner
4 owns a unit in this development. Pursuant to Civil Code § 5600, Huntington imposes
5 assessments on its member homeowners, payable monthly.
6

7 Until the real estate depression began in 2008, Miner never fell behind in paying
8 these monthly assessments. After 2008 he did. As a result, Huntington recorded an
9 assessment lien against his unit in January 2011, listing \$4,136 in unpaid assessments.

10 On April 13, 2011, Huntington filed a complaint against Miner’s trust to foreclose
11 on its assessment lien. On December 16, 2011, Huntington filed an amendment to the
12 complaint adding Miner as an individual in place of a Doe. Huntington did not serve
13 Miner until March 21, 2012. Miner, then acting in pro per, answered the complaint on
14 May 3, 2012.
15

16 Meanwhile, beginning in April 2011, Miner did everything he could think of to
17 pay off his delinquent balance. In May 2011 he sent an initial payment of \$2,000,
18 which Huntington accepted. In June and July he sent further payments of \$1,000 and
19 \$500, which Huntington also accepted.
20

21 Unable to obtain a line-item accounting from Huntington, on November 15, 2011,
22 and again on December 12, 2011, Miner tried to pay the monthly assessments so that he
23 would not get further behind. He sent two checks each for \$188. On December 16, 2011
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¹ This statement of facts is consistent with that stated by the Appellate Division
(*Huntington Continental Town House Assn., Inc. v. Miner* (2014) 222 Cal. App. 4th
Supp. 13) and the Court of Appeal (*Huntington Continental Townhouse Assn., Inc. v.*
Miner (2014) 230 Cal. App. 4th 590.)

1 Huntington's attorneys returned the checks to Miner, claiming that they could not accept
2 partial payments.

3 Finally, on December 29, 2011, after so many futile attempts to get a properly
4 documented pay-off amount, Miner calculated a total that would be more than he could
5 possibly still owe. He then sent Huntington's President a cashier's check for an
6 additional \$3,500 to overpay the balance and end the matter.
7

8 Huntington's president accepted the check and forwarded it to its attorneys to be
9 applied to his account. Instead of crediting the payment to Miner's account, however, the
10 attorneys returned this check as well and again claimed that they could not accept partial
11 payments.
12

13 Trial commenced on September 20, 2012 before the Honorable Robert H
14 Gallivan, a retired judge (now deceased) serving in a temporary capacity in Department
15 W10 at the West Justice Center. In her opening statement counsel for Huntington
16 admitted "that had that 3500-dollar payment been applied to the account, the remaining
17 balance would have been \$760 and change." Civil Code § 5720(b)² prohibits a
18 homeowner's association from pursuing judicial foreclosure where the total of delinquent
19 assessments is less than \$1,800 and less than twelve months old.
20

21 On October 22, 2012, the Court issued a minute order containing this ruling:
22 "The Court finds Defendant owes Plaintiff \$5715.39 as of 09/2012; a debt more than 12
23 months delinquent. The Court further finds Plaintiff has complied with all statutory
24 requirements of CC 1367.1 and CC 1367.4 entitling the Plaintiff to foreclose on the
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28 ² Effective January 1, 2014, the Civil Code sections implementing the Davis-Stirling Act were reorganized and renumbered. At the time of trial this provision was contained in Civil Code § 1367.4(b).

1 property securing the debt and otherwise referenced in Plaintiff's complaint.”

2 Miner appealed to the Appellate Division. On September 26, 2013, that Court
3 issued a decision reversing the judgment and holding that Huntington had wrongfully
4 rejected Miner's payments. On October 22, 2013, the Court ordered rehearing, and on
5 January 13, 2014, published an expanded opinion with the same holding.
6

7 The Appellate Division also agreed with Miner's contention that the judgment on
8 Huntington's common counts was not supported by substantial evidence. The Court
9 reversed the judgment and remanded for the trial court to make the correct determination
10 of the amount Miner owed, a determination Miner had sought since the beginning of the
11 dispute. (*Huntington Continental Town House Ass'n, Inc. v. Miner* (2014) 222 Cal.
12 App. 4th Supp. 13.)
13

14 On February 4, 2014, at the request of Huntington and several amici, the
15 Appellate Division certified the case for transfer to the Court of Appeal. On February 14,
16 2014, Huntington filed a Request for Briefing with the Court of Appeal asking that it
17 order further briefing on the issues. On February 24, 2014, the Court of Appeal ordered
18 transfer.
19

20 Miner filed the Appellants' Brief on April 9, 2014. Huntington filed its
21 Respondent's Brief on May 6, 2014. Miner filed his Appellants' Reply Brief on May 29,
22 2014. The Court of Appeal heard oral argument on July 24, 2014.
23

24 On October 14, 2014, the Court of Appeal published its opinion reversing the
25 judgment and holding that Huntington was required to accept Miner's payments.
26 (*Huntington Continental Townhouse Assn., Inc. v. Miner* (2014) 230 Cal. App. 4th 590.)
27 The Court remanded with directions for the trial court to enter judgment for Miner on
28

1 Huntington's foreclosure cause of action. The Court also reversed the judgment on
2 Huntington's common counts in accordance with the judgment of the Appellate Division.
3 Miner was awarded costs on appeal. The Court of Appeal issued the remittitur on
4 December 16, 2014.

5 Following issuance of the remittitur Miner sent to Huntington via its counsel a
6 check for the amount of the payments plaintiff had wrongfully rejected, plus an amount
7 to pay for assessments from January through September 2012, the time period before trial
8 when Huntington would not accept payments from Miner. (Declaration of Sam Walker
9 in Support of Motion for Attorney's Fees ("Walker Decl.") ¶ 9 and Exhibit 1.)
10 Consequently, Miner's delinquent assessment balance for the subject time period is less
11 than zero.
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14 If the matter proceeds to judgment on the common counts, as the Court of Appeal
15 directed, that judgment also will be in Miner's favor. For that reason, Miner believes that
16 Huntington will not proceed on its common counts and thus that the litigation has
17 concluded for all intents and purposes. (Walker Decl. ¶ 10.) Hence a decision by the
18 Court as to the prevailing party and an award of attorney's fees is in order.
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20 **III. MINER CLEARLY IS THE PREVAILING PARTY**

21 Through this action Huntington sought to enforce its Declaration of Covenants,
22 Conditions, and Restrictions, one of its governing documents. (See Memorandum of
23 Points and Authorities in Support of Plaintiff Huntington Continental Town House, Inc.'s
24 Motion for Award of Attorneys Fees Pursuant to Civil Code §§ 1354, 1366, 1367 and
25 1717, filed January 22, 2013, at p. 2.) Civil Code § 5975(c) provides that "[i]n an action
26 to enforce the governing documents, the prevailing party shall be awarded reasonable
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1 attorney's fees and costs.”³

2 In order to determine which is the prevailing party under Civil Code § 5975(c) the
3 Court must apply “a pragmatic definition of the extent to which each party has realized
4 its litigation objectives.” (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200
5 Cal. App. 4th 1146, 1154, citation omitted.) A party is the prevailing party under section
6 5975(c) when “on a ‘practical level’" it "achieve[s] its main litigation objective." (*Villa*
7 *De Las Palmas Homeowners v. Terifaj* (2004) 33 Cal.4th 73, 94, citation omitted.)
8

9 Both the Appellate Division and the Court of Appeal reversed the judgment on
10 Huntington’s cause of action for foreclosure on its assessment lien. Both the Appellate
11 Division and the Court of Appeal held that Huntington wrongfully rejected Miner’s
12 payments. The Court of Appeal remanded with directions for the trial court to enter
13 judgment in Miner’s favor on the foreclosure cause of action. These results alone makes
14 Miner the prevailing party.
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16 Clearly foreclosure and the right to reject partial payments were Huntington’s
17 overriding litigation objectives. Incontestable evidence of this is the Respondent’s Brief
18 it filed with the Appellate Division. (Walker Decl. ¶ 11 and Exhibit 2.) Huntington
19 devoted the entirety of the brief to these issues. It did not even address the common
20 counts, which were the first two claims in its complaint.
21

22 In any event, Miner also succeeded in demonstrating to the Appellate Division
23 that the judgment on Huntington’s common counts was based on erroneous accounting
24 evidence. That Court ordered the trial court to do what Miner had asked for all along:
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28 ³ Huntington’s CC&Rs apparently do not contain an attorney’s fees provision. However, since Huntington based its motion for attorney’s fees in part on Civil Code § 1717, Miner does likewise.

1 State correctly the amount he owed. However, Miner having now again paid what he
2 tried to pay in November and December 2011, plus amounts that accrued before trial, a
3 judgment on Huntington's common counts also must be in Miner's favor.⁴

4 Miner defeated Huntington's aggressive effort to foreclose on his property. He
5 established significant precedent interpreting the Davis-Stirling Act to require HOAs to
6 accept homeowner's partial payments. He thwarted Huntington's attempt to collect
7 erroneous assessment charges. There can be no doubt. Miner is the prevailing party.
8

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10 **IV. THE DECLARATION OF MINER'S COUNSEL IS SUFFICIENT TO**
11 **ESTABLISH THE HOURS HE SPENT IN THIS MATTER**

12 "An attorney's testimony as to the number of hours worked is sufficient evidence
13 to support an award of attorney fees, even in the absence of detailed time records."

14 (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.) If the
15 attorney has personal knowledge of the time spent he may prove it by declaration.

16 (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269.)

17 Furthermore, it is not necessary that the client paid or is obligated to pay the
18 attorneys fees claimed. "[I]n cases involving a variety of statutory fee-shifting
19 provisions, California courts have routinely awarded fees to compensate for legal work
20 performed on behalf of a party pursuant to an attorney-client relationship, although the
21 party did not have a personal obligation to pay for such services out of his or her own
22 assets." (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 373-374.)
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27 ⁴ Miner thus believes that Huntington will not further pursue its common counts and that, for all intents and
28 purposes, this action has reached its final outcome. However, should the Court nevertheless find otherwise,
and that this motion with respect to the action as a whole is premature, Miner obviously prevailed on the
two appeals and, therefore, is entitled to attorney's fees on appeal.

1 **V. MINER’S ATTORNEY SPENT 267 HOURS OF HIS PROFESSIONAL**
2 **TIME WORKING ON A CONTINGENT FEE BASIS**

3 “The determination of what constitutes a reasonable fee generally "begins with
4 the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable
5 hourly rate." (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "[T]he lodestar is
6 the basic fee for comparable legal services in the community; it may be adjusted by the
7 court based on factors including, as relevant herein, (1) the novelty and difficulty of the
8 questions involved, (2) the skill displayed in presenting them, (3) the extent to which the
9 nature of the litigation precluded other employment by the attorneys, (4) the contingent
10 nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the
11 fair market value for the particular action. In effect, the court determines, retrospectively,
12 whether the litigation involved a contingent risk or required extraordinary legal skill
13 justifying augmentation of the unadorned lodestar in order to approximate the fair market
14 rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

17 The “awarding of attorney fees is a highly fact-specific matter best left to the trial
18 court's discretion ... ‘However, since determination of the lodestar figure is so
19 ‘[fundamental] to calculating the amount of the award, the exercise of that discretion must
20 be based on the lodestar adjustment method.’” (*Graciano v. Robinson Ford Sales, Inc.*
21 (2006) 144 Cal.App.4th 140, 155 [reversing trial court award imposing \$250 per hour
22 rate for all attorneys involved].)

24 Sam Walker has represented Miner since August 2012. He received his law
25 degree from the University of California Hastings College of Law in 1989. He has
26 practiced in California trial and appellate courts for 25 years. (Walker Decl. ¶ 2.)

28 Walker has represented Miner primarily on a contingent fee basis. He received

1 minimal compensation for his trial work. He has received no compensation for his work
2 on the two appeals, having taken on the full risk of a contingent fee. (Walker Decl. ¶ 12.)

3 During the course of this representation through trial and two appeals Walker
4 spent 267 hours of his professional time: 109.4 for the trial phase of the litigation, 86.7
5 for the first appeal to the Appellate Division, and 71.75 for the second appeal to the Court
6 of Appeal. (Walker Decl. ¶ 13 and Exhibit 3.)

7
8 For an attorney with Walker's experience a reasonable hourly fee for handling a
9 matter like this in the trial and appellate courts is at least \$400 per hour. (Walker Decl. ¶
10 14 and Exhibit 4.) (*See Nemecek & Cole v. Horn* (2012) 208 Cal. App. 4th 641, 650-651
11 [noting Laffey Matrix shows hourly rate of \$419 for attorney with 17 years experience].
12 *See also Martin v. Fedex Ground Package System, Inc.*, Northern District of California
13 case number C 06-6883 VRW, attached to Walker Decl. as Exhibit 4, at 4 – 5 [explaining
14 Laffey Matrix and using it with the Consumer Price Index to determine standard hourly
15 rate of \$455 in Orange County for attorney with 20 years experience].) Multiplying the
16 number of hours Walker spent by this hourly rate produces a lodestar of \$106,800.
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19 In *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal. App. 4th 278, 292-
20 293, Division Three of the Fourth District Court of Appeal affirmed the trial court's use
21 of a 1.75 multiplier based on the contingent risk undertaken by counsel. The Court
22 quoted from *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1217-1218:
23

24 A contingent fee must be higher than a fee for the same legal services paid
25 as they are performed. The contingent fee compensates the lawyer not
26 only for the legal services he renders but for the loan of those services. ...
27 A lawyer who both bears the risk of not being paid and provides legal
28 services is not receiving the fair market value of his work if he is paid only
for the second of these functions. If he is paid no more, competent counsel
will be reluctant to accept fee award cases.

1 Miner respectfully urges the Court to follow this guide and also apply a 1.75
2 multiplier based on the contingent risk assumed by his counsel and the very significant
3 result he obtained. He asks the Court, therefore, to award \$186,900 in attorney's fees
4 pursuant to Civil Code §§ 5975(c) and 1717.

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6 Respectfully submitted,

7 Date: January 13, 2015



8 _____
9 Sam Walker
10 Counsel for Defendants Joseph Miner
11 and The JM Trust, Dated January 1, 2005

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PROOF OF SERVICE

I am an active member of the State Bar of California, over the age of eighteen years, and not a party to this action. My business address is 340 S. Lemon Ave. #4709, Walnut, CA 91789.

On January 13, 2015, I served the attached document entitled

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES
(Civil Code §§ 5975(c), 1717)

by placing a copy thereof in an envelope addressed as follows:

Stanley Feldsott
Jacqueline Pagano
Feldsott & Lee
23161 Mill Creek Drive, Suite 300
Laguna Hills, CA 92653

and depositing the envelope with the United States Postal Service with postage fully prepaid in the city of Arcata, California. .

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 13, 2015, at Arcata, California.



Sam Walker