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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

GORDON GROSS and LILIANA GROSS, husband and wife; 854 PINE CREEK, LLC, an Arizona limited liability company; BALD EAGLE RETREAT, LLC, an Arizona limited liability company; 1501 RAINBOW VIEW, LLC, an Arizona limited liability company; LAKESIDE FAMILY INVESTMENTS, LLC, an Arizona limited liability company, STEVEN A. KERNAGIS AND SANDRA K. KERNAGIS, trustees of THE STEVEN AND SANDRA KERNAGIS TRUST DATED MARCH 17, 2014; THOMAS P. ZEHRING AND JEANNETTE ROSE ZEHRING, trustees of THE ZEHRING LIVING TRUST DATED MARCH 1, 2001; and JEANNETTE ZEHRING, Plaintiffs, v. THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, an Arizona domestic nonprofit corporation, Defendant.	No.: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65, Plaintiffs (collectively the "Homeowners") respectfully request that the Court enter a preliminary injunction against Defendant, The Shores at Rainbow

Lake Community Association ("Master HOA"), from enforcing the Amendment[1] precluding short-term rentals throughout the Master Community. As set forth in the Complaint, the Homeowners seek (among other relief) a declaration that the Amendment is invalid and an injunction against its enforcement because:

1) the Amendment implements a rental restriction already deemed contrary to the original intent of the Townhome Declaration as determined by the Arizona Court of Appeals in *Horton v. Hartsook*, No. 1 CA-CV 08-0095;

2) the Amendment, being unenforceable within the Townhomes HOA, is invalid as to those Homeowners outside the Townhomes HOA, but otherwise governed by the Master HOA, under A.R.S. §33-1817(A)(2); and

3) the Amendment is unenforceable under *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 226 P.3d 411 (App. 2010) because it was not reasonably foreseeable based on the language of the existing governing documents and thus failed to give the Homeowners reasonable notice that the Amendment's rental restriction could be imposed by a generic majority amendment provision.

This Motion is supported by the following Memorandum of Points and Authorities, the attached exhibits, the Verified Complaint, and all other matters of record.

Memorandum of Points of Authorities

I. Introduction

The Homeowners are owners of real property located in The Shores at Rainbow Lake ("Master Community"), who have been deprived of their right to lease their properties by way of the Amendment to the Master Declaration. The Master Community is comprised of various sections/tracts, some of which contain detached single-family homes (subject to the Master Declaration) and some of which contain townhomes, including Rainbow Cove at the Shores ("Townhome Community") that is subject to the Townhome Declaration (as well as the Master Declaration). The Amendment precludes short-term rentals throughout the Master Community, including the Townhomes Community.

[1] The "Amendment" refers to the First Amendment to Amended and Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake recorded with the Navajo County Recorder at Instrument No. 2021-04383, and attached as Exhibit 1, which amends the Amended and Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake recorded with the Navajo County Recorder at Instrument No. 2001-17716 ("Master Declaration") attached as Exhibit 2.

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The Amendment is a blatant violation of the Homeowners' property rights because it restricts one of their fundamental rights as fee simple owners – the right to control the occupancy of their property through lease. For all the reasons explained below, and as will be proven in this case, the Homeowners had no notice that their right to lease their properties, a right otherwise enshrined in the Master Declaration and the Townhome Declaration, could be taken from them by a generic amendment provision. It was particularly **UN**foreseeable that a rental restriction would be imposed by within the Townhome Community given that the Arizona Court of Appeals *expressly* held in *Horton v. Hartsook* that the original intent of the Townhome Declaration was to allow short-term rentals. In that way, at least as to the Townhome Community, the Amendment seeks to accomplish indirectly that which could not be accomplished directly. Because the Amendment (which applies to the entire Master Community) is unenforceable as to the Townhome Community as it is contrary to its original intent, the Amendment is rendered unenforceable as to all because it does not satisfy A.R.S. §33-1817(A)(2).

Here, the Homeowners satisfy the typical preliminary injunction standards:

(1) the Master HOA is threatening to enforce the Amendment,[2] which results in irreparable injury as it deprives the Homeowners of the right to use their properties as they deem appropriate;[3]

(2) the Homeowners have a high likelihood of success on the merits;

(3) the Master HOA suffers essentially no harm if the Amendment is preliminarily enjoined given that leasing has occurred without the rental restriction for **decades**; and

(4) public policy generally favors protecting private property rights and, in any

[2] As discussed below, the Master HOA is threatening to levy fines for violations of the rental restriction. The Master HOA has even noticed violation hearings against some of the Homeowners. However, the Master HOA has voluntarily canceled/adjourned those hearings due to improper notice. Presumably, based upon statements during those hearings, the Master HOA will continue to take enforcement action in the future.

[3] It is anticipated that Defendants may try to argue that the Homeowners do not face irreparable harm because lost rental income and monetary fines/penalties could be remedied by money damages later. However, where damages may be uncertain, monetary damages are typically inadequate. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65, 263 P.3d 69, 73 (App. 2011).

event, by enacting A.R.S. §33-1817, the Legislature has determined that the public policy of Arizona is to be protective as to amendments to HOA documents.

There are two *additional* policy reasons supporting preliminary injunctive relief – comity and judicial economy. The Arizona Supreme Court is currently considering a case that involves the precise issues stated on page 2, above. *Kalway v. Calabria Ranch HOA, LLC*, CV-20-0152-PR.[4] At a minimum, the Court should enter a preliminary injunction until the Supreme Court rules in *Kalway* so the Court does not expend judicial resources where the applicable legal rules could change.

II. Relevant Factual Background

The Homeowners are all owners of residential real property located in the Master Community. *See* Verified Complaint at ¶9. The Homeowners enjoy their properties as second homes and use said properties for vacation and rental purposes. *Id*. at ¶10. The Homeowners and their properties are part of the Master Community, which is a common-interest community that includes the Townhome Community along with other tracts. *Id*. at ¶¶9-16.

The Master Community includes 164 single-family homes and is governed by the Master Declaration. *Id*. at ¶11. Of the 164 single-family homes in the Master Community, only 30 residents occupy the home full-time. *Id*. at ¶18. The Townhome Community is a small community made up of 24 attached townhomes, located within the Master Community, and is governed by the Townhome Declaration in addition to the Master Declaration. *Id*. at ¶14. Only 2 of the 24 townhomes in the Townhome Community are occupied by their owners full-time. *Id*. at ¶19.

The Townhome Declaration provides that the Townhome Community is subject to

[4] As articulated by the Arizona Supreme Court, *Kalway* will decide: 1) whether a statement of general subjective purpose gives the notice required for an amendment; 2) whether A.R.S. § 33-1817(A) permits an amendment that facially applies to all of the lots, but does not apply to them uniformly; 3) whether notice of the power to amend by majority vote gives notices that "entirely new" or more specific provisions may be adopted; and 4) whether the terms of the Amended CC&Rs, made without the consent of all of the owners, unreasonably altered the nature of the terms of the Original CC&Rs or were unforeseeable to a purchaser. *See* Exhibit 3.

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the terms of the Master Declaration, which suggests that any amendment to the Master Declaration would directly affect and bind homeowners in the Townhome Community. *Id*. at ¶16. Section 2.30 of the Master Declaration, as originally recorded,[5] does not prohibit or limit the ability of a homeowner to rent or lease their lots beyond the requirements that owners must lease their entire lot and notify the Master HOA of the lease and terms thereof:

> **Leasing of Lots**. No Owner may lease less than his entire Lot. Upon leasing his Lot, an Owner shall promptly notify the Association of the commencement date and termination date of the lease and the names of each lessee or other person who will be occupying the Lot during the term of the Lease.

Id. at ¶¶17 and 20. Further, Section 2.18 of the Master Declaration, a section defining "Residential Use," provides that leasing of a property by the owner shall not be considered a trade or business. *Id*. at ¶21.

Vacation rentals are common in Navajo County because of the cool summers and beautiful winters. *Id*. at ¶26. From the inception of the Master Community and the Townhome Community, vacationers have been a mainstay of the community, often visiting for short-term periods to experience the beauty and serenity of Pinetop. *Id*. at ¶27. On information and belief, significant numbers of the homeowners in both the Master Community and the Townhome Community have participated in short-term leasing. *Id*. at ¶28. In fact, as noted by the Arizona Court of Appeals, the Townhome Community was marketed for short-term vacation rentals for decades and were marketed as such by the original developer. *Horton v. Hartsook*, No. 1 CA-CV 08-0095.[6] The Homeowners have rented out their homes as short-term rentals for years. *Id*. at ¶34. The ability to use short-

[5] Prior to the Master Declaration, the Master Community was governed by a prior Declaration that was recorded with the Navajo County Recorder in 1986 at Docket No. 825, Page No. 248. It contained a nearly identical Section 2.30 to the Master Declaration. This further evidences the decades-long intent to allow leasing with no restriction as to duration.

[6] As noted in *Horton v. Hartsook*, the Townhome Declaration and Master Declaration are virtually identical with respect to the leasing language. Given the similarity of the language and the original intent of the Townhome Declaration noted by the Court of Appeals, it is difficult how Defendant could dispute that the original intent was the same under the Master Declaration.

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term rentals as a way to defray the cost of ownership was highly desirable to the Homeowners when they purchased their respective homes or, at least, is highly desirable in their decision to continue to own their homes. *Id*. at ¶33.

The vacation rental industry was revolutionized by the establishment of platforms such as VRBO and Airbnb. These platforms allow homeowners to market their homes to more potential renters by broadening the potential renter base and allowing for individuals to rent their homes on a short-term basis – typically less than 30 days. *Id*. at ¶31. The Homeowners purchased their respective homes because the Master Community was known and held out as one that, not only allowed, but *encouraged* short-term rentals. *Id*. at ¶¶27 and 32. Each of the Homeowners, as noted above, relies on the income from the short-term rental of their home to ensure that they can meet the mortgage obligations and other carrying costs for their property and continue their ownership and enjoyment of said home. *Id*. at ¶33.

On August 15, 2020, the Master Association issued a straw ballot to the Community to explore the Community's interest in amending the Master Declaration to add a short-term rental prohibition to the Declaration. *Id*. at ¶36. The ballot claimed that short-term rentals cause increased noise, cars, and trash in the Master Community, but also provided that short-term rentals were a good source of income for individuals who could not otherwise afford to own their home. *Id*. at ¶37. The purpose of the straw poll was to assess the Master Community's attitude toward a potential short-term rental restriction in the Master Declaration and stated that if at least sixty seven percent (67%) of the Community was in favor, a vote would be held to amend the Declaration. *Id*. at ¶38.

On December 21, 2020, the Master HOA issued a memo regarding the proposed amendment to the Master Declaration. This memo was sent to all members of the Master Community and included an attached a copy of the proposed Amendment to the Master Declaration. *Id*. at ¶42. The memo included consent forms which, when completed by a homeowner and returned, counted as a "yes" vote for the proposed Amendment. *Id*. at ¶43. The Master HOA requested that the Master Community return the consent forms no later

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than February 28, 2021. *Id*. at ¶44. As alleged in the Complaint, the Master HOA (and those agents working on its behalf) engaged in misconduct during the "vote" process that invalidated the purported passage of the Amendment. *Id.* at ¶¶36-55.

On February 26, 2021, *two days before the vote was to be closed*, Section 2.30 of the Master HOA purported to amend the Declaration to preclude short-term rentals by prohibiting any leases for a term of less than 30 days. *Id*. at ¶55. The Amendment deleted the existing Section 2.30 and replaced it (in pertinent part) as follows:

> 2.30. Leasing of Lots.
>
> (A) After December 31st, 2021, no Lot may be leased for a term less than thirty (30) days.
>
> (B) No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family. For purposed of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.

Id. at ¶59; *see also* Exhibit 1. The Amendment was recorded on March 3, 2021 and went into effect on January 1, 2022. *Id*. Since passing the Amendment, the Master HOA has threatened to "strictly enforce" the Amendment by "monetary penalties [that] will be substantial." *Id.* at ¶¶60-63. On January 14, 2022, the Master HOA informed the owners that the substantial monetary penalties referred to in the December 22, 2021 letter "may include amounts equal to the advertised rate for the rental." *Id.* Further, the Master HOA has issued notices of violation hearings to consider the imposition of monetary penalties against the Homeowners. *Id.* Although the Master HOA canceled those hearings due to improper notice, based on statements during the hearing, the Master HOA made clear its intent to re-notice the hearings and pursue enforcement notwithstanding this action. *Id.*

III. Legal Analysis

Preliminary injunctive relief is appropriate where: "(1) there is a real threat of irreparable injury not remediable by damages; (2) the threatened harm to the [movants] weighs more heavily in the balance than the actual injury to the [opponents]; (3) the [movants] are likely to succeed in the trial on the merits and (4) public policy favors the

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injunction." *Burton v. Celentano*, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App. 1982) (citation omitted). The balance of hardships is the "critical element" and can be met by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tip sharply in the moving party's favor. *Shoen v. Shoen,* 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

A. The Homeowners are likely to succeed on the merits.

CC&Rs, like the Master Declaration and Townhome Declaration, are contracts under Arizona law. *Powell v. Washburn*, 211 Ariz. 553, 555, ¶8, 125 P.3d 373, 375 (2006). A property owner who accepts a deed subject to restrictions assents to such restrictions and is bound by them. *Duffy v. Sunburst Farms E. Mutual Water & Agric. Co., Inc.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1980). Thus, where a conflict arises out of interpretation of restrictive covenants, such as a declaration, the interpretation of such covenants is a legal issue. Arizona has adopted the Restatement and its approach to interpreting such covenants, which recommends that interpretation of restrictive covenants should give effect to the intention of the parties, as determined by the language of the instrument, the circumstances surrounding its adoption, and the purpose for which it was created. *See generally, Powell, supra*.

Consistent with general contract law principles, an owner cannot assent to covenants or restrictions of which the owner had no notice merely by relying upon a generic amendment provision in the covenants:

> As in *Armstrong*, to allow the generic amendment provision present here to burden the homeowners' individual lots would unreasonably alter the nature of the covenants, to which implicit agreement was historically given. As in *Lakeland*, we must disallow the new burdens, as the circumstances of this development indicate a lack of proper notice that such servitudes could be imposed non-consensually under the generic amendment power.

Dreamland, 224 Ariz. at 51, ¶38, 226 P.3d at 420 (citations omitted). Therefore, the proper inquiry is whether the owner to be bound had reasonable notice from the original

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declaration that the particular covenant could be imposed without the owner's consent. *See id*; *see also Kalway v. Calabria Ranch HOA, LLC*, 2020 Ariz. App. Unpub. LEXIS 281, at *19, ¶24 (Div. 2 2020) (Unpublished memorandum decision) (Brearcliffe, J., dissenting).[7]

B. The Arizona Court of Appeals has already determined that short-term leasing was intended under the Townhome Declaration.

The Townhome Community, as noted above, is governed by the both the Townhome Declaration and the Master Declaration. The Amendment changed only the Master Declaration, but not the Townhome Declaration, presumably because it was known that a rental restriction could not be imposed by amending the Townhome Declaration because such an amendment would unreasonably alter the nature of the Townhome Declaration. As discussed above, the proper inquiry is whether the Homeowners had notice that the Master HOA could impose a restriction without their express consent.

The Court of Appeals has already held that the Townhome Declaration could not be interpreted to include a durational restriction upon lot leasing in *Horton v. Hartsook*. The Court reasoned (among other reasons) that because the Townhome Declaration indisputably allowed owners to lease their properties and imposed essentially no restrictions upon leasing (other than to provide notice), the exclusion of any language or provisions restricting lease provision indicated an intent to allow short-term leasing. With regard to interpreting whether the Amendment can be applied in the Townhome Community, the Court need not strain to determine the intent of the parties as that determination has already been noted by the Court of Appeals in *Horton*.[8]

To be clear, *Horton v. Hartsook* establishes that the drafters of the Townhome Declaration intended to not only allow short-term leasing but to *specifically* exclude the possibility of restricting lease duration. *See Horton* at ¶¶15, 16, and 20. As a result, the inquiry as to validity of the Amendment under *Dreamland* must necessarily conclude that

[7] As noted above, this unpublished memorandum decision from the Court of Appeals is currently pending before the Arizona Supreme Court. *See* Exhibit 3.

[8] The Court of Appeals noted in *Horton v. Hartsook* that, in the past, the original developer and first owners at Rainbow Cove leased units therein. *Id*. At *6, ¶4.

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the Amendment would be invalid as to the Townhome Community. Any conclusion otherwise would allow the Master Association to unreasonably alter the nature of the Townhome Declaration by using the generic amendment power under the Master Declaration, where the direct amendment to the Townhome Declaration would require unanimous consent under *Dreamland.*

C. The Amendment cannot be enforced in the Master Community because the Amendment did not comply with A.R.S. § 33-1817(A)(2) and does not comply with the *Dreamland* rule.

As a result of *Horton* and the discussion in Section III(A) above, the Amendment applies to fewer than all of the lots of the Master Community. In that circumstance, A.R.S. § 33-1817(A)(2) governs:

> 2. An amendment to a declaration may apply to fewer than all of the lots or less than all of the property that is bound by the declaration and an amendment is deemed to conform to the general design and plan of the community, if both of the following apply:
>
> * * * * *
>
> (b) The amendment receives the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies.

Thus, an amendment which applies to fewer than all of the lots or less than all of the property that is bound by the declaration must receive the affirmative vote or written consent of not only the specified number of owners in the declaration but must also receive such consent of *all of the owners* of the lots or property to which the amendment applies. Here, it is clear that the Amendment fails to satisfy A.R.S. § 33-1817(A)(2). Because the Amendment cannot apply to the Townhome Community, it necessarily applies to less than all of the owners in the Master Community. There is no question that the Amendment did **NOT** receive the consent of **ALL** owners of the Master Community.

Setting the statute aside (which is sufficient in itself), the Amendment fails under the *Dreamland* analysis for reasons similar to that in the Townhome Community. The Amendment unreasonably alters the Master Declaration as there was no such restriction or notice of potential adoption of such a restriction in the original Section 2.30. The Master

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Declaration (like the Townhome Declaration as noted in *Horton*) allowed for virtually unlimited leasing subject to only 3 requirements: 1) owners must lease their entire lot; 2) owners must notify the Master Association of lease commencement and termination dates; and 3) owners must notify the Master Association of the names of each lessee or other person who will be occupying the Lot during the lease term.

The drafters of the original lease provision language in the Master Declaration clearly intended to not only allow leasing, but to allow leasing of *any* duration just as they intended in the Townhome Declaration. No other conclusion can be legitimately reached given the similarity of the language of those respective instruments. Both required notice of a lease but had no limitation on the terms of the lease itself. Thus, while leasing was clearly contemplated, the drafters stopped short of prohibiting leases based on duration or any other terms of the lease relationship itself. Rather, just as in the Townhome Declaration, the drafters of the original Master Declaration opted to allow the property **owners** to determine the terms of the leases for the **owners'** respective properties. The drafters certainly could have restricted lease duration if they wanted to. But they did not, and that silence matters from a legal perspective when gleaning intent.

If one accepts that the language indicates an intent to allow short-term leasing – the Amendment fails under *Dreamland* for lack of proper notice to the minority that the Master Declaration could be changed in such a substantial way by a vote of the majority. Alternatively, the drafters were merely silent as to lease duration – the Amendment still fails under *Dreamland* because the minority would have had no notice that the Master Declaration could be changed by a vote of the majority to adopt an entirely new restriction upon use to which the original document was silent. This is buttressed by the language of the amendment provision itself, which contemplates "amendments" to the existing covenants but does not expressly contemplate the addition of ***entirely new restrictions*** that did not exist before. *See* Master Declaration at Section 9.2(A) of (allowing for "amendments" to the Declaration or Project Plat); *see also Webb v. Mullikin*, 142 S.W.3d 822, 828 (Mo. Ct. App. 2004) (holding that the phrase, "may amend these restrictions,"

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permits change to existing covenants but *not* to add new or different covenants).

For these reasons, the Amendment is invalid as to the Master Community. The Association did not, and presumably cannot, obtain the unanimous consent required under the statute and *Dreamland* (they certainly did not and will not obtain the Homeowners' consent).

D. The Homeowners face irreparable injury, while Defendants will suffer no harm if the Amendment is preliminarily enjoined.

Irreparable injury is found when the party seeking the injunction can demonstrate that the damages they will suffer if the injunction is not granted cannot be repaired by money alone. *IB Prop. Holdings, LLC*, 228 Ariz. at 65, 263 P.3d at 73. While the Association might argue that monetary damages would be adequate to cure the injury to Homeowners here, such a conclusion ignores what is truly happening here: the taking of a portion of the Homeowners' respective property rights.

As the Court is aware, land is viewed as "unique" such that damages are usually considered an inadequate remedy for the loss of land. *Woliansky v. Miller*, 135 Ariz. 444, 446, 661 P.2d 1145, 1147 (App. 1983). That is particularly the case where, as here, the land is intended for personal use as opposed to merely for resale at a profit. *See id.* The Amendment, by prohibiting an important, and previously *allowable*, use of their property, infringes upon the Homeowners' rights to use and enjoy their property as they see fit. Moreover, as noted above, many of the Homeowners may default on their mortgages without the income derived from short-term rental of their respective properties. To prohibit short-term rentals puts the Homeowners at risk of losing their homes altogether. Thus, the Homeowners face losing either significant sticks from their proverbial "bundle" or the "bundle" altogether.

Additionally, where damages may be uncertain, monetary damages may be inadequate and injunctive relief appropriate. *IB Prop. Holdings, LLC*, 228 Ariz. at 65, 263 P.3d at 73. To determine whether monetary damages would be an adequate remedy at law, the Court must consider the difficulty of proving the damages with reasonable certainty.

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Id. (citations omitted). Imposition of the Amendment and a failure to enjoin the Master HOA will certainly result in lost rentals. Calculating those monetary damages is an uncertain proposition because, if the Homeowners cow-tow to the Master HOA's threat, there is no way to determine how many potential rentals were even lost.

Furthermore, under A.R.S. § 33-1806.01(D), owner associations are prohibited from imposing "a fee or fine…on a member's rental property ***any differently*** than on an owner-occupied property in the association." (Emphasis supplied). Here, the Master HOA is expressly prohibited by statute from enforcing the Amendment by imposition of any proposed monetary penalty because doing so would be to impose a fee or fine differently than would be imposed on an owner-occupied property. **Given the ongoing threat of hearings and monetary fines, it is critical that the Master HOA be preliminarily enjoined from enforcing the Amendment so as to avoid unlawful monetary fines that the Master HOA will no doubt seek to enforce as money judgments in court.** Again, the Master HOA has already shown that it intends to conduct hearings and otherwise take action to enforce the Amendment through monetary fines. These fines are unlawful under statute, but if the Master HOA is not preliminarily enjoined, it will presumably continue to conduct hearings, impose unlawful fines, and then seek to enforce those fines in court as money judgments. Thus, the harm is not just the amount of the fine itself, but the time and expense to be incurred by the Homeowners in defending these proceedings, the resources of the ***other*** owners within the Master Community (who bear the costs of prosecution), and the court system in Navajo County.

E. Public policy supports a preliminary injunction.

The Court needs no primer concerning the settled public policy that favors protecting private property rights nor its fundamental underpinnings with respect to our organic documents as a nation. *See e.g.,* U.S. CONST. amend. V. Furthermore, the public policy of Arizona, as reflected by the Legislature's enactment of A.R.S. § 33-1817, is to protect the minority from the majority as it pertains to CC&R amendments. That same policy has been adopted as judicial policy as reflected by *Dreamland*. Finally, as noted

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above, there are two additional policy reasons supporting preliminary injunctive relief – comity and judicial economy. At a minimum, the Court should enter a preliminary injunction that stops enforcement of the Amendment until the Supreme Court rules in *Kalway*, at which point the parties can supplement briefing to the Court. After that, the Court can set a hearing so the Court does not expend judicial resources conducting a hearing where the applicable legal rules could change or be clarified.

IV. Conclusion

The Amendment must be enjoined because it represents an unfair restraint on the Homeowners' ability to use their property. Case law in Arizona is such that alienation of a property right that was not foreseeable in the Declaration requires the unanimous consent of all owners in the Community. This did not happen here and, because of that, the sliding scale needed to support an injunction heavily favors the Plaintiffs. Consequently, the Plaintiffs would respectfully request that this Court grant its preliminary injunction enjoining the enforcement of the Amendment.

DATED this 10th day of February, 2022.

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