Jack R. Cunningham (No. 004961)
Email: jrc@jhkmlaw.com
James L. Csontos (No. 010823)
E-mail: jlc@jhkmlaw.com
JENNINGS HAUG KELEHER MCLEOD LLP
2800 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-1049
Telephone: 602-234-7800
Facsimile: 602-277-5595

AZTurboCourt E-service and
Court Documents: docket@jhkmlaw.com
Attorneys for Defendant

THE SUPERIOR COURT OF ARIZONA

COUNTY OF NAVAJO

Gordon Gross and Liliana Gross, husband and wife *et al.*, Plaintiffs, vs. The Shores at Rainbow Lake Community Association, an Arizona nonprofit corporation, Defendant.	Case No.: S0900CV202200042 **REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

In their Response, Plaintiffs fail to rely on or discuss any authorities where the amendment in question involved a Planned Community or the amendment was to pre-existing lease restrictions. Plaintiffs instead over-state or misstate the decisions they say support their argument and hope that is good enough.

This Court should conclude the holdings of Plaintiffs' authorities are not as Plaintiffs suggest, that the Planned Communities Act applies in this case, and Plaintiffs

cannot avoid fulfilling their agreement to allow a leasing restriction amendment to the Covenants if approved by not less than 67% of the owners.

II. Legal Analysis

The Covenants are a contract "between the subdivision's property owners as a whole and individual lot owners," *Ahwatukee Custom Ests. V. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000) and are interpreted "to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding [its] creation . . . and to carry out the purpose for which it was created," *Powell v. Washburn*, 211 Ariz. 553, ¶ 13 (2006).

Plaintiffs agreed the Covenants could be amended upon "the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership." Plaintiffs do not point to "language used in the instrument" to show a different intent.

It is the presumption that "private parties are best able to determine if particular contractual terms serve their interests," *1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202, ¶ 8 (2008). Public policy exceptions to enforcing contracts are limited by the following:

> [A]bsent legislation specifying that a contractual term is unenforceable, courts should rely on public policy to displace the private ordering of relationships only when the term is contrary to an otherwise identifiable public policy that clearly outweighs any interests in the term's enforcement.

Id., citing Restatement (Second) of Contracts § 178 (1981).

For Associations covered by the Planned Communities Act, there is not only the *absence* of legislation specifying a contract term is unenforceable, there is the *affirmative* legislative statement that the amendment provision of the Covenants *is* enforceable. A.R.S. § 33-1817(A)(1) expressly and clearly provides Covenants "may be amended by the association, if any, or, if there is no association or board, the owners of the property

that is subject to the declaration, by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration." The Legislature expressly requires that owners "shall use [their property] in accordance with the declaration's rental time period restrictions." A.R.S. § 33-1806.01.

Plaintiffs claim public policy requirements allow the Court to ignore the Covenants and the Act. However, public policy requires the Court maintains and enforce contracts. *Balt. & O. S. R. Co. v. Voigt*, 176 U.S. 498, 505-06 (1900) ("Therefore, you have this paramount public policy to consider -- that you are not lightly to interfere with this freedom of contract."). Likewise, complying with the statute is required. *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 473, (1966) ("Newzona complains that appellants are seeking a harsh remedy and that such an interpretation of the contract is inequitable and therefore should not be adopted as the law of the case. But equity follows the law").

A. Plaintiffs Over-Reach on *Horton*.

Before filing the joint Response/Reply, Plaintiffs claimed there were no prior restrictions on leasing. Now, they claim (1) there were some prior restrictions (as stated in the unpublished decision of *Horton*) but there was no prior restriction specifically on the *duration*, and (2) in a prior dispute between two homeowners, Plaintiffs claim the unreported decision of *Horton v. Hartsook*, 2009 WL 2244503, 2009 Ariz. App. Unpub. LEXIS 974 (App. 2009) held "unanimous consent of that portion of the Community was required to implement a short-term leasing restriction" and further found "that the developer itself had intended and participated in short-term leasing." *See* Response, p. 4, footnote 3. Plaintiffs declare "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* Response, p. 12.

In fact, the *Horton* court did not address amendments and never, ever mentions unanimous consent. The *Horton* Court never stated an intent to "specifically exclude the possibility of restricting lease duration."

The *Horton* court instead found issues of fact on if the defendants were violating the single-family residence requirement because facts showed some of the leases were to unrelated individuals. The case was remanded to allow the trial court to determine if the properties were leased to "single families" as defined in the Covenants (before the 2021 Amendment).

At paragraph 21 of *Horton* as cited by Plaintiffs, the Court also discussed how Horton, *before becoming an owner* and therefore before being bound by or perhaps aware of the Covenants, leased a home in the community for a week at a time. Evidence of how a non-owner acted is admittedly very weak evidence for Horton to have offered.

In the dispute brought by Horton, the Court found "the Declaration does not exclude short-term leases" and "[w]ithout evidence the Declaration's drafters intended to narrowly define 'residence,' we will not do so." *Horton* at para. 16 and 20. The resolution of any evidentiary issues is not binding on this court. This Court writes on a clean evidentiary slate.

The *Horton* Court's findings quoted above are not the same as an affirmative decision "to specifically exclude the possibility of restricting lease duration" as claimed in the Response at p. 12. Plaintiffs grossly over-state the holding of *Horton* due to Plaintiffs' need to avoid decisions that decided if an amendment that limits rentals to 30-days or longer in a Planned Community is valid (*i.e.*, the *Desert Mountain* decision).

Because there was a lack of evidence in *Horton* of the intent to define the otherwise undefined phrase of "exclusively single-family residential use," the Association was permitted to put out for a vote an amendment that further defined or supplemented what is meant to use the property for "exclusively single-family

residential use." Under the 2021 Amendment, the distinction between "a place of temporary sojourn or a transient visit" and a place of "residence" is made by a requirement that leases be 30-day or longer duration. Even the *Kalway* Court would hold the later amendment defining this undefined phrase "was reasonably foreseeable." *Kalway v Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶24 (2022).

B. *Kalway* Did Not Decide a Planned Community Dispute.

A "Planned Community" is defined to be one where the Association owns and operates common areas, requires mandatory membership in an Association, and tasks the Association with "managing, maintaining or improving" the common areas. A.R.S. § 33-1802. Plaintiffs do not claim the five lots in *Kalway* were a "Planned Community."

In *Kalway*, there were 5 lots with one lot owner having 2 votes. Prior to the amendment, anything from manufactured homes to mansions were allowed on site. In the Supreme Court's opinion, the Court of Appeals decision, or in or trial court's decision there is no mention of any common areas owned by an Association. The five lots were not a "Planned Community" as defined at ARS § 33-1801 *et seq*.

In *Kalway*, the Court held A.R.S. § 33-1817(A) "does not displace the common law, which prohibits some amendments even if passed by a majority vote." Under the facts of *Kalway*, it is easy to understand why A.R.S. § 33-1817 does not displace common law. That is because the five lots in *Kalway* were not part of a "Planned Community." The legislature did not intend any portion of the Planned Communities Act (such as A.R.S. § 33-1817) would apply. *See* applicability of the Act at A.R.S. § 33-1801. *Kalway*, *Dreamland*, or other decisions that do not consider an Association expressly governed by the Act do not offer help in interpreting the Act.

C. The Shores at Rainbow Lake Is a Planned Community.

The Shores at Rainbow Lake is undeniably a "Planned Community" and is precisely the type of community the Arizona Legislature intended to govern under the

Act. "When the legislature enacts a statute, there is a presumption that the legislature has knowledge of the existing laws." *Daou v. Harris*, 139 Ariz. 353, 357 (1984). "Law encompasses more than just statutes; it also includes constitutional provisions, the common law, and judicial decisions." *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 553 (2005).

When the Arizona legislature stated at A.R.S. § 33-1817 that Covenants can be amended "by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration," the Arizona legislature took into account the same common law the *Dreamland* Court considered and relied upon in stating an amendment passed by a simple majority on property not governed by the Act may not be valid.

The *Dreamland* Court was not bound by the legislature's statement of public policy applicable to Planned Communities because it was "*noteworthy* that there were no common areas within Dreamland Villa" and thus the Planned Communities Act did not apply. *Dreamland Villa Community Club, Inc. v Raimey*, 224 Ariz. 42 (App. 2021). Likewise, the Court in *Kalway* was not bound by A.R.S. § 33-1817 and was free to hold that this statute "does not displace the common law" on properties not expressly governed by the Act.

D. Reliance on Authorities Discussing "Planned Communities" Is Best.

Plaintiffs fail to discuss any appellate authority where the Association owns the common areas and is expressly governed by the Planned Communities Act. Plaintiffs fail to discuss any authority discussing 30-day requirements on leasing. By their silence, Plaintiffs concede they have no legal basis for why an Association expressly covered by the Act cannot safely follow the statutory requirements when passing an amendment to require 30-day or longer leases.

There is a decision where the Court of Appeals considered an Association expressly covered by the Planned Communities Act. This is a decision where the Court

of Appeals also expressly addressed an amendment to the Association's already restricted leasing provisions. In other words, there is a case on all fours.

In the unreported decision of *Desert Mountain Master Association*, 2021 WL 1691532, 2021 Ariz.App. Unpubl LEXIS 489 (April 29, 2021) *pet. for rev. denied* January 4, 2022, the decision provides this Court with a very good idea of how the Court of Appeals will look at this issue. In the Cross-Motion, Defendant discussed at pages 7-10 how the issues in *Desert Mountain* were

> ". . . identical to the issues in this action:
>
> - An Association that owned, controlled and maintained common areas.
> - Declarations that could be amended only by a 67% super-majority vote.
> - An Association regulated by the Planned Communities Act where time restrictions on rentals are permitted under the Act at A.R.S. § 33-1806.01(A). "

Response/Cross-Motion, p. 8. The *Desert Mountain* Court enforced the amendment that added a 30-day or greater limit on the other pre-existing lease requirements.

Defendants described how the Arizona Supreme Court not only denied the owners' petition for review but later awarded the Association its additional attorney fees for having to respond. *See* Response/Cross-Motion, p. 10; Arizona Supreme Court's Order at *Nicdon 10663 LLC v. Desert Mt. Master,* No. CV-21-0123-PR, 2021 WL 1691532, 2022 Ariz. LEXIS 20, at *1 (Jan. 4, 2022).

Plaintiffs did not discuss or attempt to distinguish this decision on identical issues other than to say at p. 7 of Plaintiffs' Response, "For obvious reasons, the Court should be guided by the more recent and controlling opinion set forth *Kalway* than an unpublished Court of Appeals case."

Being recent is not as important as being identical. Each bullet item listed above is *not* found in *Kalway*. Moreover, *Kalway* adopted *Dreamland*. The common law that both *Kalway* and *Dreamland* relied upon was in existence and discussed in *Desert Mountain*, before the Court found the 30-day lease amendment was valid.

Plaintiffs do not claim that *Kalway* is any different from the common law decisions, including *Dreamland*, expressly considered by the *Desert Mountain* Court when finding the 30-day lease requirement valid.

E. Foreseeability.

As of today, the Arizona Supreme Court has not considered an Association governed by the Planned Communities Act and whether the Arizona Legislature's statutes provide for a clear rule of law. The Arizona Supreme Court has not considered an Association in a Planned Community adding a lease duration requirement.

If these issues come before the Court, the Arizona Supreme Court would find the durational restriction on what constitutes leasing a property "devoted exclusively to Single-Family residential use" to be valid. The Arizona Supreme Court would enforce the Legislature's intent and statement of public policy and find the Act specifies how amendments are passed in a Planned Community under A.R.S. § 33-1817 and further expressly allows durational restrictions on leases. *See* A.R.S. § 33-1806.01(A).

In *Kalway*, the Court stated its holding as follows: "We hold that an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." *Kalway*, ¶ 14. An amendment stating leases of 30-days or longer are allowed or that "changes in a particular way" the definition of "single family" not an "affirmative obligation" added to the pre-existing restrictions found in the Covenants. Plaintiffs do not claim otherwise.

But even if the Arizona Supreme Court treated the 2021 Amendment as adding affirmative obligations and applied common-law exceptions to the Covenants and the Act, the difference between using a property like a hotel or as a residence is a difference foreseeable to other courts, and thus is objectively foreseeable to Plaintiffs. Other courts understand the difference between a hotel-like rental and renting a property out as a

residence. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008)(defining "*residence*" as * * * distinguished from a place of *temporary sojourn or a transient visit.*"); *City of New York v. Big Apple Mgmt.*, 2019 N.Y. Misc. LEXIS 1804; 2019 WL 1744268 (Supreme Ct., New York 2019) (describing property advertised on Airbnb as constituting the "conversion of the Subject Buildings from residential to *transient use*.").

Here, although the Covenants state leasing is not part of the prohibited "commercial" use of the lots, the Covenants do not provide that all leasing would be considered "exclusively devoted to residential use." The duration of the lease can be a distinguishing factor when considering if the property is put to "residential use" or is just being used as a place of temporary stay or sojourn. For vacation renters, after their vacation is over they return to their "residence." The Association monitors the duration of each lease, and the Covenants always required an owner to report to the Association the start and end date of every lease.

The owners knew the duration of leases was important enough to require reporting, and therefore it was foreseeable that the Association would act upon the information it gathered. Moreover, *Kalway* does not require communities governed by common law to provide a warning that *every particular detail* of the Covenants may be subject to amendment. The *Kalway* Court more broadly stated at ¶ 17:

> The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way.

The Court will agree "a restrictive or affirmative covenant exists" regarding the leasing of property. The pre-existing requirements include that leases are limited to "exclusively single-family residential use" and owners must report each lease's

duration and allow monitoring by the Association of the owner's use of common areas which are prohibited during the duration of any lease. The Association was granted an easement to ascertain the Tenants' use of the property and common areas. The Association is required to monitor violations of the Covenants and to maintain and repair the common areas. An amendment to the prior restrictions to "refine it, correct an error, fill in a gap, or change it in a particular way" is expressly allowed under *Kalway*, ¶ 17. A 30-day requirement for an allowed but regulated lease or that alters the defined term of "single family" simply refines, corrects or changes in a particular way the restrictions already in place, as *Kalway* allows.

As a matter of math, a property leased every 30 days will not be subject to review by the Association more than 12 times a year, while a property leased to weekend vacationers could be leased and subject to Association review up to 52 times a year. If vacation renters only book one night or a few nights in the middle of the week, a property could be rented as many as 365 times each year.

Due to the time and cost involved, it is foreseeable the Association would use the lease duration issue to find a happy medium between effort and cost vs. number of leases to review and tenants to track. That alone is a sufficient and foreseeable reason to limit the number of times a property can be leased. Plaintiffs do not claim mandatory reporting of duration was for any other purpose.

It may also be reasonable to assume people staying a weekend do not have the time to fully read (or read at all) the Covenants, and there is an increase in violations of the Covenants by those staying for a weekend compared to those who make the property their "residence." Other communities have found this to be true – resulting in action by cities and counties cited in the Cross-Motion. Even Airbnb found it necessary to avoid rule breakers by banning certain types of rentals. *See* https://www.airbnb.com/help/article/2704/party-and-events-policy (last reviewed July

11, 2022). The Association, as the owner of the common areas is responsible for maintenance and repair, shares the same concerns and it was foreseeable restrictions could come.

Also, the Arizona legislature established public policy by expressly providing Associations of Planned Communities can continue to include in their Declarations a limit on the duration of a rental. *See* A.R.S. §§ 33-1817 and 33-1806.01(A). The Legislature knew it was foreseeable that Associations in Planned Communities could restrict the duration of rentals, and made it clear that the Legislature's policy of prohibiting cities from restricting vacation rentals did not apply to an Association in a Planned Community. *Compare* A.R.S. § 9-500.39 (cities cannot restrict vacation rentals).

F. Uniformity of Regulations.

Plaintiffs conclude owners of townhomes must provide unanimous consent of any change to leasing. *See* Response, p. 12. Plaintiffs claim the 2021 Amendment applies "to fewer than all of the lots." Response, p. 12 line 15.

However, the 2001 Covenants clearly state all 188 lots are governed by the Covenants. An amendment to the 2001 Covenants also applies uniformly to each of the 188 lots. The 188 lots include the residences in the area called the "Cove." Both documents apply to all 188 lots. A more uniform application cannot exist.

G. Difference Between Super-Majority and Simple Majority.

Although both *Dreamland* and *Kalway* make specific reference to the simple majority vote the amendments received, Plaintiffs argue no different result would be reached under a different set of facts, such as if by agreement, the parties restricted amendments to only those that 33.1% of the owners allowed to pass.

In this case, any amendment can be blocked by a minority of the owners. All Plaintiffs needed was 33.1% or more of the owners of either of the two classes of voters to not vote at all or to vote "no" and the amendment would not pass. Although *Kalway*

at ¶ 15 discuses how "the law will not subject a minority of landowners to unlimited and unexpected" amendments, in this case a small minority (33.1%) of the owners dictate if an amendment will pass. There is no need to add common law protections in this matter. A minority or the owners are already in control. An example of a super-majority vote is in *Desert Mountain*, where the Court found the 30-day lease amendment valid.

III. CONCLUSION.

The 188 Lots and Owners (including the 7 Plaintiffs) in the exclusive gated community at The Shores at Rainbow Lakes are subject to a comprehensive set of Declarations, are governed by a Board of Directors elected by the Owners, and are regulated by the Arizona Planned Communities Act. A.R.S. § 33-1801 to §33-1818. This degree of regulation compelled the *Desert Mountain* Court to conclude "Here, the governing statutes and case law are decisive[.]" *Id*. at ¶ 26.

The Association is interested in not just how each Owner uses their Lot, but also in how each Owner's use impacts the common areas and thus impacts all other Owners' use of the common areas. This presents a significantly different set of facts from the facts considered in *Dreamland* or *Kalway*, which discuss common-law limits on a contractual right to amend by a simple-majority vote without the Association owning and maintaining common areas.

Even if *Dreamland* as adopted by *Kalway* applies to regulated Planned Communities, the 2001 Restated and Amended Declarations contain sufficient definitions, restrictions, and requirements on leasing and the tenants' use of property within the gated community to put Owners on notice that future amendments could change the current Declarations. Leasing has always been regulated by the Covenants and is still allowed and regulated under the Amendment. The term "Single Family" has always been a defined term and can be "changed in a particular way."

For the reasons outlined in the Cross-Motion Defendant respectfully requests the Court enter partial summary judgment in favor of Defendant. Defendant also requests and award of costs and attorney fees be imposed against Plaintiffs, jointly and severally, as allowed under A.R.S. § 12-341.01 and Nicdon 10663 LLC v. Desert Mt. Master, No. CV-21-0123-PR, 2021 WL 1691532, 2022 Ariz. LEXIS 20, at *1 (Jan. 4, 2022) (Arizona Supreme Court awards Association its attorney fees).

DATED this 13th day of July 2022.

JENNINGS HAUG KELEHER MCLEOD LLP

/s/ James L. Csontos
Jack R. Cunningham
James L. Csontos
Attorneys for The Shores at Rainbow Lake Community Association,

Copy of the foregoing mailed
and emailed this 13th day of July 2022, to:

Stockton D. Banfield
DYER BREGMAN & FERRIS, PLLC
3411 N. 5th Avenue, Suite 300
Phoenix, AZ 85013-3811
sdb@dbfazlaw.com
Attorneys for Plaintiffs

Rick K. Carter
Matthew A. Klopp
WONG & CARTER
3003 N. Central Avenue, Suite 1000
Phoenix, AZ 85012
rcarter@wongandcarter.com
mklopp@wongandcarter.com
Attorneys for Plaintiffs

/s/ Annette McLaughlin
Annette McLaughlin