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17 Attorneys for Plaintiffs

18 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
19 **IN AND FOR THE COUNTY OF NAVAJO**

20 GORDON GROSS and LILIANA
21 GROSS, husband and wife; 854 PINE
22 CREEK, LLC, an Arizona limited liability
23 company; BALD EAGLE RETREAT,
24 LLC, an Arizona limited liability company;
25 1501 RAINBOW VIEW, LLC, an Arizona
26 limited liability company; LAKESIDE
27 FAMILY INVESTMENTS, LLC, an
28 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; JEANNETTE ZEHRING;
RONALD D. KYER, JR. and DESIREE
KYER, husband and wife,

Plaintiffs,

v.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, an
Arizona nonprofit corporation,

Defendant.

No.: S0900CV202200042

FIRST AMENDED VERIFIED
COMPLAINT

(Quiet Title; Breach of Implied Covenant
of Good Faith and Fair Dealing)

1 For their First Amended Complaint against the Defendant, the Plaintiffs allege as
2 follows:

3 **PARTIES, JURISDICTION, AND VENUE**

4 1. Plaintiffs, Gordon Gross and Liliana Gross, are husband and wife and owners
5 of real property located in Navajo County at 2366 Bald Eagle Point, Lakeside, which is
6 within the Shores and subject to the recorded instruments described below.

7 2. Plaintiff 854 Pine Creek, LLC is an Arizona limited liability company and is
8 the owner of real property located in Navajo County at 854 Pine Creek Drive, Lakeside,
9 which is within the Shores and subject to the recorded instruments described below.

10 3. Plaintiff Bald Eagle Retreat, LLC is an Arizona limited liability company
11 and is the owner of real property located in Navajo County at 2343 Bald Eagle Point,
12 Lakeside, which is within the Shores and subject to the recorded instruments described
13 below.

14 4. Plaintiff 1501 Rainbow View, LLC is an Arizona limited liability company
15 and is the owner of real property located in Navajo County at 1501 Rainbow View Drive,
16 Lakeside, which is within the Shores and subject to the recorded instruments described
17 below.

18 5. Plaintiff Lakeside Family Investments, LLC is an Arizona limited liability
19 company and is the owner of real property located in Navajo County at 2321 Bald Eagle
20 Point, Lakeside, which is within the Shores and subject to the recorded instruments
21 described below.

22 6. Plaintiffs, Thomas P. Zehring and Jeannette Rose Zehring, Trustees under
23 the ZEHRING LIVING TRUST are husband and wife and, with Jeannette Zehring, are
24 owners of an undivided 50% interest of the real property located in Navajo County at 685
25 Pine Creek Drive, Lakeside, which is within the Shores and subject to the recorded
26 instruments described below.

27 7. Plaintiffs, Steven A. Kernagis and Sandra K. Kernagis, Trustee of the
28 STEVEN AND SANDRA KERNAGIS TRUST dated March 17, 2014, are husband and

1 wife and owners of an undivided 50% interest of the real property located in Navajo County
2 at 685 Pine Creek Drive, Lakeside, which is within the Shores and subject to the recorded
3 instruments described below.

4 8. Plaintiffs Ronald D. Kyer, Jr. and Desiree Kyer, are husband and wife and
5 owners of real property located in Navajo County at 2355 Lakeshore Circle, Lakeside,
6 which is within the Shores and subject to the recorded instruments described below.

7 9. Defendant The Shores at Rainbow Lake Community Association (“the
8 Master HOA”) is an Arizona nonprofit corporation doing business in Navajo County,
9 Arizona.

10 10. The real property and actions that form the basis of this lawsuit occurred in
11 Navajo County, Arizona. Accordingly, jurisdiction and venue are proper in this Court.

12 **DISCOVERY TIER**

13 11. Upon currently known information and belief, pursuant to Rule 26.2(c)(3),
14 *Ariz.R.Civ.P.*, the Court should assign this case to Tier 3.

15 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

16 12. The Homeowners are all owners of residential real property located in a
17 subdivision called The Shores at Rainbow Lake (“the Community or “The Shores”).

18 13. None of the Homeowners are full-time residents or occupiers of their
19 properties; rather, all use their properties as a second home for vacation and/or rental
20 purposes.

21 14. The Shores is comprised of 164 single-family homes, as well as various
22 Tracts, as more particularly described on the plat recorded in the Navajo County Recorder’s
23 Office at Book 16 of Maps, pages 21-27.

24 15. The Shores is governed by that certain Amended and Restated Declaration
25 of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake (“the Master
26 Declaration”), which is recorded in the Navajo County Recorder’s Office at Number 2001-
27 17716 and incorporated by reference.

28 16. The Master HOA is the homeowners association vested with the powers and

1 duties contained in the Master Declaration.

2 17. Rainbow Cove at the Shores (“The Cove”)¹ is a small community within The
3 Shores made up of 24 townhomes.

4 18. The Cove is governed by the Master Declaration as well as that certain
5 Amended and Restated Declaration of Covenants, Conditions and Restrictions for
6 Rainbow Cove at the Shores (“the Townhome Declaration”), which is recorded in the
7 Navajo County Recorder’s Office at Number 1989-07118 as amended by Number 2006-
8 36535 and incorporated by reference.

9 19. The Townhome Declaration provides that The Cove is subject to the terms
10 of the Master Declaration. Thus, any amendment to the Master Declaration would apply to
11 The Cove and effectuate an indirect amendment to the Townhome Declaration.

12 20. The Master Declaration, prior to the Amendment at issue, did not prohibit or
13 restrict the ability of a homeowner to rent or lease their lots, regardless of duration, except
14 for a requirement to provide notice to the Master HOA of the terms of the lease.

15 21. Of the 164 single-family homes in The Shores, only 30 are occupied full-
16 time by the owners thereof.

17 22. Of the 24 townhomes in The Cove, only 2 are occupied full-time by the
18 owners thereof.

19 **Relevant Provisions of the Master Declaration**

20 23. With respect to leasing, Section 2.30 of the Master Declaration provides:

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

26 *See* Master Declaration, Navajo County Recorder’s Office Number 2001-17716, at p. 16.

27 ¹ The Cove is subject to oversight/enforcement by the Master HOA as well as Rainbow
28 Cove at the Shores Owners Association (“the Townhome HOA”). Although officers of the
Townhome HOA assisted the Master HOA with respect to the vote on the Amendment, it
is not a party as none of the Homeowners own property within The Cove. Further, it is
unclear whether the Townhome HOA will seek to enforce the Amendment.

1 The Shores and The Cove participated in the short-term leasing common to The Shores
2 and The Cove prior to purchasing their homes in the Community.

3 32. The Homeowners have all used their respective property as short-term
4 rentals.

5 33. The ability to lease the property as a short-term rental was a highly desirable
6 feature considered by each of the Homeowners when they purchased their respective
7 properties.

8 34. The vacation rental market was revolutionized by the establishment of
9 platforms such as VRBO and Airbnb. These platforms allow homeowners to market their
10 homes to more potential renters by broadening the potential renter base and allowing for
11 individuals to rent their property on a short-term basis – often under 30 days.

12 35. Each of the Homeowners purchased their property in the Community
13 because the Community was known and held out as one which, not only allowed, but
14 encouraged short-term rentals.

15 36. Each of the Homeowners relies on the income from the short-term rentals for
16 mortgage servicing, repairs, maintenance, utilities, and other carrying costs for their
17 properties.

18 37. The Homeowners have been using their respective properties as short-term
19 rentals without incident for years.

20 38. Each Homeowner personally uses their property regularly and allows short-
21 term renters on a somewhat sporadic basis.

22 **The Improper Tactics Used to “Pass” the Amendment**

23 39. On August 15, 2020, the Master HOA issued a straw ballot to the Community
24 to explore the Community’s interest in amending the Master Declaration to add a short-
25 term rental prohibition.

26 40. The ballot stated that short-term rentals cause increased noise, cars, and trash
27 in the Community, but also provided that short-term rentals were a good source of income
28 for individuals who could not otherwise afford a vacation home.

1 41. The purpose of the straw poll was to assess the opinion of the Community as
2 to whether it wanted a short-term rental restriction in the Declaration and stated that if at
3 least sixty seven percent (67%) of the Community was in favor, a vote would be held to
4 amend the Master Declaration.

5 42. The tactics used by both the Master HOA (and the Townhome HOA acting
6 at its behest) were nothing short of underhanded and deceitful.

7 43. Pro-rental restriction members knocked on the doors of homeowners in the
8 Community, called them repeatedly, and accosted them in public after the straw ballot
9 indicated the proposed rental restriction lacked the necessary community support.

10 44. This underhanded and deceitful strategy implemented by the Master HOA
11 (and the Townhome HOA acting at its behest) resulted in the required number of consent
12 forms being submitted to propose an amendment to the Master Declaration.

13 45. On December 21, 2020, the Master HOA issued a memorandum regarding
14 the proposed amendment to the Master Declaration. This memorandum was sent to all
15 members of the Community and included an attached copy of the proposed rental
16 restriction amendment to the Master Declaration.

17 46. The memorandum included consent forms which, when completed by a
18 homeowner and returned, counted as a “yes” vote for the proposed rental restriction
19 amendment.

20 47. The Master HOA requested that the Community return the consent forms no
21 later than February 28, 2021.

22 48. The Homeowners requested that a committee be formed for drafting a fair
23 short-term rental policy – one which did not restrict rental duration to less than 30 days.

24 49. The Master HOA agreed to appoint an independent committee to work with
25 the Homeowners on drafting the short-term rental provision.

26 50. Despite this promise, the committee only met twice and never delivered the
27 promised collaboration and action.

28 51. Approval of the rental restriction was secured, in large part, by false

1 representations by the Presidents of the Master HOA and the Townhome HOA.

2 52. In January of 2021, Tom Pyzdek – a member of the Community – wrote a
3 column that was published in the White Mountain Independent. This column included
4 various misstatements and half-truths which were relied upon by residents of the
5 Community when filling out the aforementioned Consent Forms.

6 53. The statements made in the White Mountain Independent were false and
7 corrected by a property owner who used his residence as a short-term rental.

8 54. Despite knowing that the statements were false, the Master HOA did not
9 notify the Community in any way that the statements were false or to correct what had been
10 published. Rather, the Master HOA President exacerbated the situation by putting forward
11 further misinformation and falsehoods.

12 55. Meanwhile, the President of the Townhome HOA, who upon information
13 and belief was acting at the behest of the Master HOA, lied to a resident of The Cove to
14 secure his signed consent form.

15 56. Specifically, the Townhome HOA President told an owner that the
16 Homeowners were offered a 7-day rental duration option that had been rejected and, based
17 on that misrepresentation, the owner returned his signed consent form voting to approve
18 the proposed rental restriction amendment.

19 57. This vote was significant because this owner’s vote was the deciding vote
20 that provided the sixty-seven percent (67%) majority of Class A Members.

21 58. On February 26, 2021, *before the closing of voting*, the Master HOA
22 purported to adopt the proposed amendment to Section 2.30 of the Declaration prohibiting
23 short-term rentals (“the Amendment”) and recorded the same as more specifically
24 described below.

25 59. On March 15, 2021, the Homeowners sent a letter to the Master HOA
26 requesting copies of the consent forms underlying the purported vote for review.

27 60. This letter set forth numerous concerns regarding how the consent forms
28 were obtained, including:

- 1 a. Neighbors were told that the Homeowners were made an offer to
- 2 compromise and they refused when, in fact, no offer was ever made and no
- 3 discussion was actually had with the Homeowners.
- 4 b. The neighbors were never informed that the Homeowners lowered the
- 5 number of renters and hired a manager to oversee the rentals and handle
- 6 complaints.
- 7 c. The Master HOA repeatedly blamed issues within the Community on the
- 8 Homeowners (and by implication their short-term renters) without any
- 9 support.
- 10 d. The Master HOA never produced the “hundreds of complaints” it allegedly
- 11 received against renters of the Homeowners’ properties.
- 12 e. Neighbors were falsely told that members of the Homeowners were
- 13 investors.
- 14 f. The neighbors were falsely told that there were hundreds of extra people in
- 15 the Community during the summer because of the Homeowners rentals.
- 16 g. Neighbors reported that the tactics used by the Shores HOA to obtain consent
- 17 forms put bill collectors to shame.

18 *See* 3/15/2021 Letter attached as **Exhibit A**.

19 **Recording and Enforcement of the Amendment**

20 61. Notwithstanding the above, the Master HOA recorded the Amendment with

21 the Recorder of Navajo County, Arizona at Instrument No. 2021-04383 on March 3, 2021,

22 which is incorporated by reference.

23 62. The Amendment provides as follows:

24 1. Article 2, Section 2.30 shall be deleted in its entirety and replaced with

25 the following:

26 2.30. Leasing of Lots.

27 (A) After December 31st, 2021, no Lot may be leased for a term

28 less than thirty (30) days.

1 (B) No portion of a Lot may be leased, other than the entire Lot,
2 and then only to a Single Family. For purposed of this Section 2.30, a Single
3 Family may not consist of more than four (4) individuals who are unrelated
4 by blood, marriage or legal adoption.

5 (C) An Owner who leases his Lot shall provide the following
6 information to the Association at least ten (10) days before the
7 commencement of the lease term:

8 (i) the commencement date and expiration date of the lease
9 term;

10 (ii) the names and contact information of any adults
11 occupying the Lot during the lease term; and

12 (iii) the address and telephone number at which the Owner
13 (or Owner's agent) can be contacted by the Association during the lease term.

14 (D) Any agreement for the lease of a Lot shall provide that the term
15 of such lease shall be subject in all respects to the provisions of the Project
16 Documents and that any failure by the Lessee to comply with the terms of
17 the Project Documents shall be a default under the lease. Any Owner who
18 leases a Lot must provide the Lessee with a copies of this Declaration, the
19 Architectural Committee Rules and the Association Rules and is responsible
20 for assuring the Lessee's compliance therewith. The Owner shall be liable
21 for any violation of this Declaration, the Architectural Committee Rules or
22 the Association Rules by the Lessees or other persons residing in the Lot and
23 their guests or invitees and, in the event of any such violation, the Owner,
24 upon demand of the Association, shall immediately take all necessary actions
25 to correct any such violations.

26 63. On December 19, 2021, the Master HOA sent out a newsletter addressing the
27 enactment of the Amendment and the consequences for violating the same. The newsletter
28 stated:

On Friday, December 17, the Shores board met in executive session with our attorney Wendy Ehrlich for the purpose of obtaining legal advice regarding enforcement of the short term rental restriction CC&R amendment. She will be preparing a letter to go out to the community in January. What we can tell you now is that the board plans to *strictly enforce the amendment and the monetary penalties will be substantial.*

See Newsletter attached as **Exhibit B** (emphasis added).

64. On January 14, 2022, the Master HOA sent out another letter addressing the enforcement of the new rental restriction, stating:

The Association intends to impose monetary penalties against owners who do not rent their properties in accordance with the short-term rental restriction. Reasonable monetary penalties may include amounts equal to the

1 advertised rate for the rental. The Association reserves the right to bypass a
2 courtesy notice if an owner has a history of violating the short-term rental
3 restriction. Under Arizona law, the CC&R's are a contract between the
4 Association and its members, and by statute, owners are required to rent their
5 homes in conformance with the time limitation in the amendment. [Citing to
6 A.R.S. § 33-1806.01]

7 See Newsletter attached as **Exhibit C** (emphasis added).

8 65. Subsequently, the Master HOA purported to initiate violation hearings
9 against two of the Homeowners.

10 66. However, due to various defects with respect to the notices issued by the
11 Master HOA related to the violation hearings, the Master HOA canceled the subject
12 hearings subject to its promise to re-notice the same, properly, at which time it would
13 consider the fines or other enforcement measures to impose.

14 **COUNT I**
15 **(Quiet Title)**

16 67. Plaintiffs hereby repeat and reiterate the allegations set forth above as
17 thought fully set forth herein and further alleges as follows.

18 68. The Homeowners are the owners in fee simple of the real property located in
19 The Shores, which are subject to the Master Declaration and the Amendment as more
20 particularly described above.

21 69. Through the Amendment, the Master HOA has encumbered the
22 Homeowners' properties adverse to that of each Plaintiff, and such claims are without any
23 right whatsoever.

24 70. By virtue of Arizona law, the Master HOA has no estate, right, title, or
25 interest in the Homeowners' properties (or any part thereof), by the Amendment.

26 71. Specifically, the Amendment implements a rental restriction already deemed
27 contrary to the original intent of the Townhome Declaration, and thus unenforceable to the
28 portions of The Shores that constitute The Cove, as determined by the Arizona Court of
Appeals in *Horton v. Hartsook*, No. 1 CA-CV 08-0095.

72. Because the Amendment is unenforceable within The Cove, it is invalid as
to the portions of The Shores outside The Cove under A.R.S. § 33-1817(A)(2).

1 73. The Amendment is unenforceable under Arizona law because it was not
2 reasonably foreseeable based on the language of the existing governing documents and
3 thus failed to give the Homeowners reasonable notice that a rental restriction like the
4 Amendment could be imposed by the generic amendment provision in the Master
5 Declaration.

6 74. The Amendment is invalid and unenforceable due to the conduct, described
7 above, that was undertaken by the Master HOA in seeking to adopt the Amendment.

8 75. The Amendment is invalid and unenforceable because it was passed without
9 compliance with the procedures required under the Master Declaration and Arizona law.

10 76. At least 20 days prior to the filing of this Complaint, each Plaintiff tendered
11 to the Master HOA a Notice disclaiming any interest in above identified properties under
12 the Amendment and declaring the Amendment invalid, together with the sum of \$5.00 from
13 each Plaintiff pursuant to A.R.S. § 12-1103(B), and requested that the Master HOA execute
14 the Notice.

15 77. The Master HOA has ignored Plaintiffs' requests and indicated during an
16 open meeting that it will continue to enforce the Amendment until instructed otherwise by
17 a court.

18 78. As a direct and proximate result, the Master HOA is liable to Plaintiffs for
19 their attorneys' fees and costs incurred herein pursuant to A.R.S. § 12-1103(B).

20 79. Pursuant to Rule 55(b)(1), *Ariz.R.Civ.P.*, in the event that judgment by
21 default is rendered in favor of Plaintiffs, Plaintiffs seek reasonable attorneys' fees in an
22 amount not less than \$5,000.00.

23 **WHEREFORE**, Plaintiffs, Gordon Gross and Liliana Gross, 854 Pine Creek, LLC,
24 Bald Eagle Retreat, LLC, 1501 Rainbow View, LLC, Lakeside Family Investments, LLC,
25 Steven A. Kernagis and Sandra K. Kernagis, trustees of The Steven and Sandra Kernagis
26 Trust Dated March 17, 2014, Thomas P. Zehring and Jeannette Rose Zehring, trustees of
27 The Zehring Living Trust Dated March 1, 2001, Jeannette Zehring, and Ronald D. Kyer,
28 Jr. and Desiree Kyer, demand judgment against Defendant, The Shores at Rainbow Lake

1 Community Association, for:

- 2 (a) Quiet title as to the Amendment;
- 3 (b) A declaration that the Amendment is invalid and unenforceable as a matter
- 4 of law;
- 5 (c) A declaration that the Master HOA is precluded from imposing penalties and
- 6 enforcing the failure to pay penalties through liens or otherwise under
- 7 authority purportedly created by the Amendment;
- 8 (d) An injunction enjoining the Master HOA from asserting any claim
- 9 whatsoever to the properties, or any part thereof, under the Amendment;
- 10 (e) An injunction enjoining the Master HOA from attempting to enforce the
- 11 Amendment;
- 12 (f) Attorneys' fees and costs pursuant to A.R.S. §12-1103(B); and
- 13 (g) Such further relief as the Court may deem equitable and just.

14 **COUNT II**

15 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

16 80. Plaintiffs hereby repeat and reiterate the allegations set forth above as though

17 fully set forth herein.

18 81. Arizona law implies a covenant of good faith and fair dealing in every

19 contract. *See, Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986).

20 82. Arizona law recognizes that a party breaches the implied covenant of good

21 faith and fair dealing by (a) exercising express discretion in a way inconsistent with a

22 party's reasonable expectations and (b) by acting in ways not expressly excluded by the

23 contract's terms but which nevertheless bear adversely on the party's reasonable expected

24 benefits.

25 83. Defendant breached the implied covenant by, among other things: (a)

26 changing the benefits bargained for under the Master Declaration with respect to short-

27 term rentals by adopting an amendment which was not authorized or properly noticed by

28 the Master Declaration; (b) administering a vote for adopting said amendment which failed

to comply with the requirements of the Master Declaration; and (c) even if the requirements

of the Master Declaration were complied with, adopting an amendment that bears adversely

1 upon the Homeowners' reasonably expected benefits as to short-term rentals.

2 84. As a result of Defendant's breach of the covenant of good faith and fair
3 dealing, Plaintiffs have suffered and will continue to suffer damages to be proven at trial.

4 85. As a direct and proximate result, the Master HOA is liable to Plaintiffs for
5 their attorneys' fees and costs incurred herein pursuant to A.R.S. §§ 12-341 and -341.01.

6 86. Pursuant to Rule 55(b)(1), *Ariz.R.Civ.P.*, in the event that judgment by
7 default is rendered in favor of Plaintiffs, Plaintiffs seek reasonable attorneys' fees in an
8 amount not less than \$5,000.00.

9 **WHEREFORE**, Plaintiffs, Gordon Gross and Liliana Gross, 854 Pine Creek, LLC,
10 Bald Eagle Retreat, LLC, 1501 Rainbow View, LLC, Lakeside Family Investments, LLC,
11 Steven A. Kernagis and Sandra K. Kernagis, trustees of The Steven and Sandra Kernagis
12 Trust Dated March 17, 2014, Thomas P. Zehring and Jeannette Rose Zehring, trustees of
13 The Zehring Living Trust Dated March 1, 2001, Jeannette Zehring, and Ronald D. Kyer,
14 Jr. and Desiree Kyer, demand judgment against Defendant, The Shores at Rainbow Lake
15 Community Association, for:

- 16 (a) Breach of the covenant of good faith and fair dealing;
- 17 (b) Compensatory, incidental, and consequential damages in an amount to be
18 proven at trial, plus interest as allowed by law;
- 19 (c) Post-judgment interest at the statutory rate;
- 20 (d) Attorneys' fees and costs pursuant to A.R.S. §§ 12-341 and -341.01;
- 21 (e) Attorneys' fees and costs related to any collection effort of monetary
22 damages due; and
- 23 (f) Such further relief as the Court may deem equitable and just.

24 DATED this 15th day of July, 2022.

25 DYER BREGMAN & FERRIS, PLLC. WONG & CARTER, PC.

26 BY /s/ Stockton D. Banfield
27 Stockton D. Banfield
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27 Rick K. Carter
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This 15th day of July, 2022 to:

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