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10 Attorneys for Plaintiffs

11
12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF NAVAJO**

14 GORDON GROSS and LILIANA
15 GROSS, husband and wife; 854 PINE
CREEK, LLC, an Arizona limited liability
16 company; BALD EAGLE RETREAT,
LLC, an Arizona limited liability company;
17 1501 RAINBOW VIEW, LLC, an Arizona
limited liability company; LAKESIDE
18 FAMILY INVESTMENTS, LLC, an
Arizona limited liability company,
19 STEVEN A. KERNAGIS AND SANDRA
K. KERNAGIS, trustees of THE STEVEN
20 AND SANDRA KERNAGIS TRUST
DATED MARCH 17, 2014; THOMAS P.
21 ZEHRING AND JEANNETTE ROSE
ZEHRING, trustees of THE ZEHRING
22 LIVING TRUST DATED MARCH 1,
2001; and JEANNETTE ZEHRING,

23 Plaintiffs,

24 v.

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

27 Defendant.
28

No.: S0900CV202200042

**PLAINTIFFS' APPLICATION FOR
ATTORNEYS' FEES**

Re: September 14, 2022 Ruling on Motion
and Cross-Motion for Summary Judgment

(Assigned to the Hon. Michala M.
Ruechel)

1 Pursuant to Rule 54(c), Plaintiffs (the “Homeowners”) hereby submit their
2 Application for Attorneys’ Fees. This Application for Fees concerns fees that the
3 Homeowners incurred to force the Defendant to quiet title to their respective properties by
4 removing the invalid short-term rental prohibition contained in the First Amendment from the
5 public record and, thereby stopping the encumbrance of their respective properties by the
6 same Defendant, all of which was addressed in and resolved by this Court’s September 14,
7 2022 Ruling (the “Ruling”).

8
9 **Memorandum of Points of Authorities**

10 **I. Introduction**

11 In its Ruling dated September 14, 2022, this Court granted partial summary
12 judgment in favor of the Homeowners and against Defendant on the primary dispute of this
13 matter: the validity of the First Amendment as pertaining to its short-term rental ban. While
14 the Court found in favor of Defendant with respect to other ancillary aspects of the First
15 Amendment, the primary dispute between the Parties was whether the short-term rental
16 ban introduced by the First Amendment was, in fact, valid under Arizona law. In granting
17 partial summary judgment, this Court ruled that such a ban created an entirely new,
18 different, and unforeseeable restriction upon the Homeowners’ respective use of their
19 property and was therefore invalid. The Homeowners have two primary claims to their
20 fees: (1) A.R.S. § 12-1103(B) and (2) A.R.S. § 12-341.01(A).

21 The prevailing party in a quiet title action may recover attorneys’ fees if it complies
22 with the statutory requirements. *Cook v. Grebe*, 245 Ariz. 367, 369, 429 P.3d 1161, 1163
23 (App. 2018). The determination of who is the prevailing party for purposes of awarding
24 fees under A.R.S. §12-1103(B) turns on whether a party successfully quieted title,
25 regardless of whether claims that do not involve quieting title are included in the same
26 lawsuit. *Id* at ¶8 (citations omitted). In determining the prevailing party, the Court may
27 consider other factors customarily considered in Arizona in making such determinations,
28 such as which party achieved its primary objective in the litigation and the “totality of the

1 litigation” *Ahwatukee Custom Estates Management Ass’n v. Turner*, 196 Ariz. 631, 2 P.3d
2 1276 (App. 2000); *Schwartz v. Farms Ins. Co. of Ariz.*, 166 Ariz. 33, 800 P.2d 20 (App.
3 1990); *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 612 P.2d 500 (App.
4 1980).

5 Additional factors courts may consider in determining whether to award fees for
6 quiet title actions are those considered when considering a request for fees under A.R.S.
7 §12-341.01. *Scottsdale Memorial Health Sys. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094,
8 1098 (App. 1990). Here, Homeowners have complied with the statutory requirements to
9 recover their fees and have successfully quieted title by invalidating the short-term rental
10 ban included in the First Amendment. Specifically, on January 7, 2022, the Homeowners
11 sent the Defendants a Disclaimer of Interest letter pursuant to A.R.S. § 12-1103(B) along
12 with the required title document and the five dollar (\$5.00) fee which was received by the
13 Defendants on January 12, 2022 as evidenced by the letters and certified mail return receipt
14 attached as **Exhibit A**. The letter included a copy of the Complaint which clearly stated
15 that the short-term rental addendum was not foreseeable, and that provision must be
16 amended. The Defendants did not comply with the A.R.S. § 12-1103(B) letter and a
17 Complaint was filed on February 10, 2022 – 29 days after receipt. The Ruling confirmed
18 the position that the Homeowners have expressed to the Defendants since November 19,
19 2020 – the short term rental addendum was not foreseeable to the Homeowners and must
20 be stricken.

21 Furthermore, the factors listed by the Arizona Supreme Court in considering fees
22 under A.R.S. § 12-341.01 weigh in favor of awarding Homeowners their fees because: (1)
23 the merits of Defendant’s positions are non-existent in the face of recent Supreme Court
24 guidance on the precise issues presented in this dispute; (2) the litigation could have been
25 avoided entirely had the Defendant simply complied with the Homeowners’ quiet title
26 demand that was made before the initiation of the lawsuit. Had Defendant done so,
27 Homeowners would not have needed to bring the action to quiet title; (3) because of the
28 procedural posture of this case and when the dispositive motions occurred, we never

1 engaged in disclosure/discovery so it is unclear whether Defendant has insurance that
2 would cover the fees here; and (4) while Homeowners did not prevail on other aspects of
3 the First Amendment, they did prevail on the key and primary issue: the short-term rental
4 ban, the invalidation of which was the primary concern and goal of the proceedings
5 heretofore. With respect to the overarching aim of the Homeowners, they are
6 unquestionably the successful party and obtained the chief relief sought. Therefore, under
7 Arizona law, Homeowners should be awarded their attorneys' fees and costs incurred in
8 quieting title as provided by the statute.

9 The Shores Declaration contains covenants and restrictions, forming an enforceable
10 contract. *Kalway v. Calabria Ranch Hoa, LLC*, -- Ariz. Adv. Rep. -- 506 P.3d 18, 24, ¶14
11 (Ariz., Mar. 22, 2022). This contested action arose out of that contract and the Defendant's
12 attempt to modify the same. Such being the case, the Court may award the successful party
13 reasonable attorneys' fees. A.R.S. § 12-341.01(A). As noted above, the factors set forth by
14 the Arizona Supreme Court in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694
15 P.2d 1181, 1184 (1985) weigh in favor of awarding Homeowners their reasonable
16 attorneys' fees for the reasons set forth above.

17 Under either statute, Arizona law supports the award of Homeowners reasonable
18 attorneys' fees and costs. Such being the case, Homeowners respectfully request that this
19 Court make such an award in the amount of **\$96,962.58** as set forth in the both attached
20 declarations of counsel and supporting exhibits thereto.¹ This amounts to a total of **\$97,**
21 **289.45**. The Homeowners respectfully request entry of an Order awarding them fees in this
22 amount.

23 **II. Legal Analysis**

24 As noted above, the Homeowners are requesting fees pursuant to both A.R.S. §12-

25
26 ¹ As the Court is aware, there are two firms serving as counsel to Plaintiffs in this dispute.
27 Such being the case, attached to this Application are declarations of counsel from (1)
28 Stockton D. Banfield, of Dyer Bregman & Ferris, PLLC and lead counsel for this dispute
and (2) Rick K. Carter, of Wong & Carter, PC, co-counsel of record in this dispute.

1 1103(B) and §12-431.01(A). While these are distinct statutes and rationale for awarding
2 fees, both give the Court discretion in determining whether to make such an award. The
3 considerations under either statute are essentially the same, with the exception of the court
4 considering the quieting title factor and the requesting party's compliance under A.R.S.
5 §12-1103(B). *Cook v. Grebe*, 245 Ariz. 367, 369, 429 P.3d 1161, 1163 (App. 2018);
6 *Scottsdale Memorial Health Sys. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App.
7 1990).

8 Thus, it is up to this Court to determine whether the Homeowners were the
9 successful party in this dispute and, if they were, weigh the various factors set forth by the
10 Supreme Court to determine whether to award Homeowners their fees. *Associated Indem.*
11 *Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *Cook v. Grebe*, 245
12 Ariz. 367, 369, 429 P.3d 1161, 1163 (App. 2018); *Scottsdale Memorial Health Sys. v.*
13 *Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990).

14 A. Prevailing Party.

15 In quiet title actions, the determination of who is the prevailing party turns on
16 whether a party successfully quieted title, regardless of whether claims that do not involve
17 quieting title are included in the same lawsuit. *Cook v. Grebe*, 245 Ariz. 367, 369, 429 P.3d
18 1161, 1163 (App. 2018) (citations omitted).

19 In *Cook*, the party objecting to the award of fees argued that the superior court had
20 erred in finding that the other party was the prevailing party because “he prevailed on a
21 greater number of claims than she did” *Id* at ¶7. While the Homeowners and Defendant
22 were both granted partial summary judgment on the same counts, Defendant will
23 presumably argue that it prevailed on a greater number of sub-parts of the First Amendment
24 and, therefore, should be considered the prevailing party. As *Cook* explains, determination
25 of success hinges on whether title was quieted, not the number of subparts or claims
26 prevailed on. Here, it is indisputable that Homeowners have quieted title to their property
27 through the invalidation of the chief issue in this dispute: the short-term rental prohibition
28 contained in the First Amendment. As the court held in *Cook*:

[T]he superior court did not abuse its discretion in finding she
[Grebe] was the prevailing party with regard to the attorneys’

1 fee provision of § 12-1103(B). Contrary to Cook’s assertion,
2 the court had no reason to look further than the quiet title and
3 adverse possession claims because they are the only claims in
4 this lawsuit that involved quieting title to the property.

5 *Id* at ¶9. Similarly, the Court need not look further than the quiet title claim in this case in
6 determining whether Homeowners were the prevailing party. For the Homeowners to be
7 considered the prevailing party, they need only have achieved their primary objective by
8 quieting title.

9 The Court of Appeals has held that where a party fails to achieve its primary
10 objective in the litigation, it is not the successful party under A.R.S. §12-341.01.
11 *Ahwatukee Custom Estates Management Ass’n v. Turner*, 196 Ariz. 631, 2 P.3d 1276 (App.
12 2000) (plaintiff vindicated its enforcement authority under CC&Rs but failed in its
13 principal effort to obtain mandatory retrospective injunctive relief). As noted above,
14 Homeowners achieved their primary objective: invalidating the short-term rental
15 prohibition contained in the First Amendment and thereby quieting title. The record is
16 replete with instances evidencing that invalidating the short-term rental prohibition was the
17 primary objective of the Homeowners. While our prayer for relief requested invalidation
18 of the entire Amendment, the primary objective, as evidenced throughout the Complaint,
19 was to remove the short-term rental prohibition. *See* First Complaint at ¶¶ 32-33, 35-41,
20 48-51, 56-58, 63-64, 71, 73, and 83. The Ruling does exactly that, finding that the language
21 of the First Amendment, with respect to the short-term rental prohibition, was invalid under
22 Arizona law.

23 Furthermore, under Arizona law, the Court may consider the “totality of the
24 litigation” *Am. Power Prods. V. CSK Auto, Inc.*, 241 Ariz. 564, 390 P.3d 804 (2017);
25 *Schwartz v. Farms Ins. Co. of Ariz.*, 166 Ariz. 33, 800 P.2d 20 (App. 1990); *Nataros v.*
26 *Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 612 P.2d 500 (App. 1980). Here, the
27 totality of the litigation also weighs heavily in favor of awarding Homeowners their fees.
28 After giving Defendant a chance to withdraw the First Amendment without resorting to
litigation, Homeowners were able to convince Defendant to stipulate to not attempt to
enforce the restrictions contained in the First Amendment pending the outcome of

1 litigation. In the Ruling, the Court found that the short-term rental prohibition was invalid
2 under Arizona law, achieving Homeowners' primary objective in the litigation. When
3 considering the totality of the proceedings and litigation, it is clear that Homeowners are
4 the successful party in this dispute.

5 The Homeowners successfully quieted title with respect to the short-term rental
6 prohibition, thereby accomplishing their primary objective of the litigation. Such being the
7 case, it is clear that Homeowners have prevailed for purposes of awarding attorneys' fees.

8 **B. Other Factors.**

9 In addition to considering which party prevailed in the litigation, when considering
10 whether to award fees for quiet title actions, courts may consider the *Associated Indemnity*
11 factors set forth by the Supreme Court. *Scottsdale Memorial Health Sys. v. Clark*, 164 Ariz.
12 211, 215, 791 P.2d 1094, 1098 (App. 1990). Those factors are: (1) the merits of the claim
13 or defense presented by the unsuccessful party; (2) the litigation could have been avoided
14 or settled and the successful party's efforts were completely superfluous in achieving the
15 result; (3) assessing fees against the unsuccessful party would cause an extreme hardship;
16 (4) the successful party did not prevail with respect to all of the relief sought; (5) the novelty
17 of the legal question presented and whether such claim or defense had previously been
18 adjudicated in this jurisdiction; and (6) whether the award would discourage other parties
19 with tenable claims or defenses from litigating or defending legitimate contract issues for
20 fear of incurring liability for substantial amounts of attorneys' fees. *Associated Indem.*
21 *Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

22 As noted above, it is clear that these factors weigh in favor of awarding
23 Homeowners their fees: (1) the merits of Defendant's positions are non-existent in the face
24 of recent Supreme Court guidance on the precise issues presented in this dispute; (2) the
25 litigation could have been avoided entirely had the Defendant simply complied with the
26 Homeowners' quiet title request that was made before the initiation of the lawsuit. Had
27 Defendant done so, Homeowners would not have needed to bring the action to quiet title;
28 (3) because of the procedural posture of this case and when the dispositive motions
occurred, we never engaged in disclosure/discovery so it is unclear whether Defendant has
insurance that would cover the fees here; and (4) while Homeowners did not prevail on

1 other aspects of the First Amendment, as noted above, they did prevail on their primary
2 objective: invalidating the short-term rental ban.; (5) the issues presented in the case were
3 not novel. Before the Supreme Court issued further guidance in *Kalway*, Arizona law had
4 long held that unforeseeable modifications to a community declaration were not valid
5 under *Dreamland*. Similarly, these questions had been adjudicated in Arizona both in
6 *Dreamland* and *Kalway*; (6) awarding the Homeowners their reasonable attorneys' fees
7 here would not discourage other property owners from seeking to invalidate unlawful
8 amendments to their community documents. Rather, an award of attorneys' fees here
9 would likely encourage other like property owners to assert their rights under Arizona law
as the Homeowners have done here.

10 This award of fees may also encourage other home owners associations from taking
11 drastic action that deprives property rights without the consent of all residents in the
12 association. It cannot be ignored that the Homeowners have been trying to work with the
13 Defendants since November of 2020 to come up with a reasonable solution to resolve the
14 alleged concerns that the Defendants had with short-term renters. Unfortunately, at each
15 and every opportunity to negotiate in good faith, the Defendants turned a deaf ear to the
16 Homeowners. The only recourse that the Homeowners had to ensure that the Defendants
17 would engage and discuss the problems with the short-term amendment was to file a
18 lawsuit. Stated simply: the litigation started because the Defendants refused to have
19 meaningful discussion with the Homeowner. This, in and of itself, warrants attorneys fees
20 simply as a deterrent to future presidents to take unilateral and aggressive actions towards
21 concerned homeowners.

22 **III. Conclusion**

23 Homeowners have incurred significant expense and costs in achieving their primary
24 objective in this litigation: the invalidation of the short-term rental ban contained in the
25 First Amendment. Homeowners have complied with the quiet title statute requirements,
26 quieted title to their respective properties, prevailed on their primary objective in the
27 litigation, and are the party the other factors to be considered weigh in favor of. Such being
28

1 the case, Homeowners respectfully request that the Court award Plaintiffs their reasonable
2 attorneys' fees and costs pursuant to A.R.S. §§12-1103(B), 12-341, and 12-341.01.

3 DATED this 4th day of October, 2022.

4
5 DYER BREGMAN & FERRIS, PLLC.

6 BY /s/ Stockton D. Banfield

7 Stockton D. Banfield
8 Charles M. Dyer
9 Attorneys for Plaintiffs

10 WONG & CARTER, PC.

11 BY /s/ Joseph R. Rainey

12 Rick K. Carter
13 Matthew A. Klopp
14 Joseph R. Rainey
15 Attorneys for Plaintiffs

16 ORIGINAL electronically filed via TurboCourt
17 This 4th day of October, 2022.

18 COPIES emailed and mailed
19 This 4th day of October, 2022 to:

20 Jack Cunningham
21 Jim Csontos
22 JENNINGS HAUG KELEHER McLEOD LLP
23 2800 North Central Avenue, Suite 1800
24 Phoenix, Arizona 85004
25 *Attorneys for Defendant*

26 By: /s/ Kay Spates

EXHIBIT A

WONG 和 CARTER An Arizona Professional Corporation

Counselors & Attorneys

Phoenix

Phoenix Corporate Center
3003 N. Central Avenue
Suite 1000
Phoenix, Arizona 85012
Telephone 602 287 3360
Facsimile 602 287 3365

Scottsdale

94 Hundred Corporate Center
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The Historic Martinez House
106 S. Madison Avenue
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Yuma, Arizona 85364
Telephone 928 752 0094
Facsimile 928 752 0097

Matthew A. Klopp

Admitted in Arizona

MKlopp@WongandCarter.com

www.WongandCarter.com

Please Respond to Phoenix

January 7, 2022

Via Certified Mail, R.R.R.

Via Certified Mail (without R.R.R.)

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, INC.

Attn: Richard Whipple

826 Pine Creek Circle

Lakeside, Arizona 85929

RAINBOW COVE AT THE SHORES
OWNERS ASSOCIATION

Attn: Doris Morin

2472 Dragonfly Lane

Lakeside, Arizona 85929

**Re: Notice and Demand to Quiet Title
First Amendment to the Shores Declaration (Instrument No. 2021-04383)**

To Whom It May Concern,

Please be advised that our firm has been retained by 854 Pine Creek, LLC, Bald Eagle Retreat, LLC, 23621 Verrazanno Bay, LLC, Steve and Sandra Kernagis, Thomas and Jeannette Zehring, 1501 Rainbow View, LLC, Lakeside Family Investments, LLC, and Gordon and Liliana Gross (collectively, the "Homeowners") to quiet title to their properties located within the Shores at Rainbow Lake community at the following addresses:

- 854 Pine Creek, LLC - 854 Pine Creek Drive, Lakeside, AZ 85929
- Bald Eagle Retreat, LLC - 2343 Bald Eagle Point, Lakeside, AZ 85929
- 23621 Verrazanno Bay, LLC - 2297 Dragonfly, Lakeside, AZ 85929
- Steve and Sandra Kernagis - 685 Pine Creek Drive, Lakeside, AZ 85929
- Thomas and Jeannette Zehring - 685 Pine Creek Drive, Lakeside, AZ 85929

- 1501 Rainbow View, LLC - 1501 Rainbow View Drive, Lakeside, AZ 85929
- Lakeside Family Investments, LLC - 2321 Bald Eagle Point, Lakeside, AZ 85929
- Gordon and Liliana Gross - 2366 Bald Eagle Point, Lakeside, AZ 85929

On February 26, 2021 the Shores at Rainbow Lake Community Association, Inc. (the "Master HOA"), on February 26, 2021, recorded an the First Amendment to the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake, with the Recorder of Navajo County, Arizona at Instrument No. 2021-04383 ("the Amendment"). The Amendment provides, among other things, that all leases of property within the Community exceed 30 days, thus prohibiting short-term rentals (the "Amendment"). That Amendment is invalid under Arizona law and cannot be enforced by either the Master HOA or the The Cove at the Shores Owners Association (the "Townhome HOA") for various reasons as discussed in the enclosed draft Complaint and Motion for Preliminary Injunction.

Therefore, the Homeowners hereby demand that the Master HOA's Board of Directors take prompt action to clear title to the properties of the wrongful encumbrance. Should the Board of Directors refuse to comply with the demand set forth below, the Homeowners will not hesitate to exercise their legal rights, including the filing of the enclosed pleadings to quiet title, seek preliminary and injunctive relief, and attorneys' fees and costs incurred.

A copy of a draft Complaint and Motion for Preliminary Injunction, which further explain the basis for this demand, are enclosed along with a proposed instrument to invalidate the Amendment that can be recorded with the Navajo County Recorder's Office so as to obviate the need to file a lawsuit. If the enclosed instrument is not executed and returned to our office within twenty (20) days of your receipt of this letter, the Homeowners will file the enclosed lawsuit to quiet title pursuant to A.R.S. § 12-1103, and the Homeowners will seek all available damages under Arizona law along with their attorneys' fees and costs incurred in such lawsuit from the Association pursuant to statute. Finally, as required by statute, enclosed is a \$5.00 check made payable to The

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, INC.
RAINBOW COVE AT THE SHORES
OWNERS ASSOCIATION

January 7, 2022

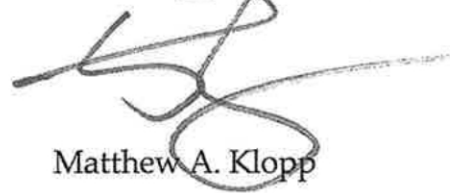
Page 3 of 3

Shores at Rainbow Lake Community Association, Inc. in connection with the statutory demand for execution of the instrument.

As a courtesy, we have sent a copy of this letter and the attachments thereto to who we believe to be counsel for the Master HOA. We look forward to your prompt response and cooperation, as well as the Townhome HOA to the extent the Townhome HOA intends to enforce or claim any interest in the validity of the Amendment.

Sincerely,

WONG 和 CARTER, P.C

A handwritten signature in black ink, appearing to read 'Matthew A. Klopp', is written over the printed name below.

Matthew A. Klopp

Encls. (inc. Chk. No. 3264)

Cc: Wendy Ehrlich (via email and regular mail)
9671 North Horizon Vista Place
Oro Valley, Arizona 85704
wehrlich@comcast.net

When recorded, return to:
Wong & Carter, P.C.
3003 North Central Avenue Suite 1000
Phoenix, Arizona 85012

**QUITCLAIM DEED
AND NOTICE OF INVALIDITY**

NOTICE IS HEREBY GIVEN that the First Amendment to the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake, recorded with the Recorder of Navajo County, Arizona at Reception No. 2021-04383 (the "First Amendment") on February 26, 2021, which purports to amend the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake recorded at Instrument No. 2001-17716 on September 6, 2001, which First Amendment affects the legal and/or equitable interest of the fee owners of that certain real property situated in Navajo County, Arizona more particularly described in the foregoing instruments, is invalid and unenforceable as a matter of law. Therefore, no right, title, or interest is created, nor is any conveyance or encumbrance granted, by the First Amendment to any party.

Dated this ___ day of _____, 2022.

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, INC.,
an Arizona non-profit corporation

By: _____
Its: _____

STATE OF ARIZONA)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 2022 by _____, the _____ of THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation.

Notary Public

My Commission Expires:

1 DYER BREGMAN & FERRIS, PLLC
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4 (602) 254-6008
5 Stockton D. Banfield #027789
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10 (602) 287-3360
11 Rick K. Carter #012660
12 rcarter@wongandcarter.com
13 Matthew A. Klopp #023313
14 mklopp@wongandcarter.com

15 Attorneys for Plaintiffs

16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
17 **IN AND FOR THE COUNTY OF NAVAJO**

18 GORDON GROSS and LILIANA
19 GROSS, husband and wife; 854 PINE
20 CREEK, LLC, an Arizona limited liability
21 company; BALD EAGLE RETREAT,
22 LLC, an Arizona limited liability company;
23 23621 VERRAZANNO BAY, LLC, an
24 Arizona limited liability company;
25 STEVEN A. KERNAGIS AND SANDRA
26 K. KERNAGIS, trustees of THE STEVEN
27 AND SANDRA KERNAGIS TRUST
28 DATED MARCH 17, 2014; THOMAS P.
ZEHRING AND JEANNETTE ROSE
ZEHRING, trustees of THE ZEHRING
LIVING TRUST DATED MARCH 1,
2001; JEANNETTE ZEHRING; 1501
RAINBOW VIEW, LLC, an Arizona
limited liability company; and LAKESIDE
FAMILY INVESTMENTS, LLC, an
Arizona limited liability company,

Plaintiffs,

v.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, INC., an
Arizona domestic nonprofit corporation;
and RAINBOW COVE AT THE SHORES
OWNERS ASSOCIATION, an Arizona
domestic nonprofit corporation;

Defendants.

No.:

VERIFIED COMPLAINT

(Quiet Title; Breach of Implied Covenant
of Good Faith and Fair Dealing;
Declaratory/Injunctive Relief)

1 For its Complaint against the above-named Defendants, 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. Plaintiffs, Thomas P. Zehring and Jeannette Rose Zehring, Trustees under
8 the ZEHRING LIVING TRUST are husband and wife and, with Jeannette Zehring, are
9 owners of an undivided 50% interest in the real property located in Navajo County at 685
10 Pine Creek Drive, Lakeside, which is within the Shores and subject to the recorded
11 instruments described below.

12 3. Plaintiffs, Steven A. Kernagis and Sandra K. Kernagis, Trustee of the
13 STEVEN AND SANDRA KERNAGIS TRUST dated March 17, 2014, are husband and
14 wife and owners of an undivided 50% interest in the real property located in Navajo County
15 at 685 Pine Creek Drive, Lakeside, which is within the Shores and subject to the recorded
16 instruments described below.

17 4. Plaintiff 845 Pine Creek, LLC (“Pine Creek”) is a limited liability company
18 organized under the laws of the State of Arizona and is the owner of real property located
19 in Navajo County at 854 Pine Creek Drive, Lakeside, which is within the Shores and
20 subject to the recorded instruments described below.

21 5. Plaintiff Bald Eagle Retreats, LLC (“Bald Eagle”) is a limited liability
22 company organized under the laws of the State of Arizona and is the owner of real property
23 located in Navajo County at 2343 Bald Eagle Point, Lakeside, which is within the Shores
24 and subject to the recorded instruments described below.

25 6. Plaintiff 1501 Rainbow View, LLC (“Rainbow View”) is a limited liability
26 company organized under the laws of the State of Arizona and is the owner of real property
27 located in Navajo County at 1501 Rainbow View Drive, Lakeside, which is within the
28 Shores and subject to the recorded instruments described below.

1 incorporated herein as **Exhibit A**.

2 17. There are 164 single-family homes in the Shores, and of those 164, only 30
3 are occupied full-time by the owners thereof.

4 18. The Cove is a small community made up of 24 townhomes and is governed
5 by the Townhome Declaration which was recorded in the Navajo County Recorder's Office
6 at Number 1989-07118 and an adopted amendment found at Number 2006-36535. A copy
7 of which is attached and incorporated herein as **Exhibit B**.

8 19. Of the 24 townhomes in the Cove only 2 are occupied full-time by the
9 owners thereof.

10 20. The Townhome Declaration provides that the Shores HOA is the Master
11 HOA and the Shores' Declaration is the Master Declaration and that the Cove is subject to
12 the terms of the Master Declaration. Thus, any amendment to the Master Declaration would
13 directly affect and bind townhome owners in the Cove.

14 21. The Master Declaration, as originally recorded, did not in any way prohibit
15 or restrict the ability of a homeowner to rent or lease their lots.

16 **Relevant Provisions of the Declaration**

17 22. The Master Declaration did not specifically restrict the ability to lease lots.
18 Specifically, Section 2.30 of the Master Declaration's provides:

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

24 *See, Exhibit A, p. 16.*

25 23. Section 2.18 of the Master Declaration provides that leasing of a residence
26 by the owner shall not be considered a trade or business. *Id.* at p. 12.

27 24. Section 4.5 of the Master Declaration provides that every owner of a lot or
28 parcel shall automatically be a Member of the Association. *Id.* at p. 22.

25. Section 4.6 of the Master Declaration provides that each Member of the

1 Association is entitled to one vote. *Id.* at p. 22 – 23.

2 26. Section 5.3 of the Shores Declaration provides as follows:

3 **5.3. Extraordinary Assessment.** The Association may levy an assessment
4 against an Owner and such Owner's Lot or Parcel, for the following
5 expenses:

- 6 (i) Any expense caused by the misconduct of such Owner;
- 7 (ii) Any expense incurred by the Association pursuant to Section 6.2 of
8 the Declaration as a result of the Owner's failure to maintain his Lot
9 or Parcel, and the improvements located thereon, in accordance with
10 the terms of this Declaration.
- 11 (iii) Any expenses incurred by the Association pursuant to Section 6.1 of
12 this Declaration as a result of repairs, maintenance or replacements to
13 the Common Areas or to portions of the Lots and Parcels the
14 Association is obligated to maintain which is caused by the willful or
15 negligent act of an Owner, his family, guest, invites or animals.
- 16 (iv) Any expense incurred by the Association in towing any vehicle or
17 equipment of an Owner pursuant to Section 2.26 of the Declaration.

18 *See, Exhibit A at p. 27.*

19 27. Section 9.2. Amendment, provides that an owner vote representing not less
20 than sixty-seven percent (67%) of the votes in each class of membership is required to
21 amend the Declaration. *Id.* at p. 40.

22 28. Section 9.6 of the Shores Declaration provide:

23 **Change of Circumstance.** Except as otherwise expressly provided in the
24 Declaration, no change of conditions or circumstances shall operate to
25 extinguish, terminate, or modify any of the provisions of this Declaration.

26 *See, Exhibit A at p. 41.*

27 29. Section 9.7 of the Shores Declaration provides:

28 **Rules and Regulations.** In addition to the rules and regulations on the
matters expressly mentioned elsewhere in this Declaration, the Association
shall have the right to adopt rules and rules and regulations with respect to
all other aspects of the Association's rights, activities, and duties, provided
said rules and regulations are not inconsistent with the provisions of this
Declaration.

Id.

History of Vacation Rentals

1
2 30. Vacation rentals are commonplace in Navajo County because of the cool
3 summers and beautiful winters.

4 31. The Shores and the Cove, since their inception, have been established as a
5 vacation community where people stay for short-term periods.

6 32. On information and belief, a majority of the homeowners in both the Shores
7 and the Cove participated in the short-term leasing common to the Shores and the Cove
8 prior to purchasing their homes in the Community.

9 33. The Homeowners have all used their respective property located in the
10 Shores or the Cove as short-term rentals.

11 34. The ability to lease the property as a short-term rental was a highly desirable
12 feature of the Property considered by each Homeowners when they purchased their
13 respective properties.

14 35. The vacation rental market was revolutionized by the establishment of
15 platforms such as VRBO and Airbnb. These platforms allow homeowners to market their
16 homes to more potential renters by broadening the potential renter base and allowing for
17 individuals to rent their property on a short-term basis – typically under 30 days.

18 36. Each of the Homeowners purchased their property in the Community
19 because the Community was known and held out as one which, not only allowed, but
20 encouraged short-term rentals.

21 37. Each of the Homeowners relies on the income from the short-term rentals to
22 ensure that it can meet the mortgage payment obligations for their property.

23 38. The Homeowners have been using their respective property as short-term
24 rentals without any real incident for almost a decade.

25 39. Each Homeowner personally uses their property regularly and does not
26 consistently have short-term renters leasing the property.

The First Amendment

27
28 40. On August 15, 2020, the Shores HOA issued a straw ballot to the Community

1 to explore the Community’s interest in amending the Master Declaration to add a short-
2 term rental prohibition to the Declaration.

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

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

10 43. The tactics used by both the Shores HOA and the Cove HOA were nothing
11 short of guerrilla marketing.

12 44. Homeowners will testify that HOA members knocked on the doors of
13 homeowners in the Community, called them repeatedly, and accosted them in public.

14 45. This underhanded and deceitful strategy implemented by the Shores HOA
15 and the Cove HOA resulted in the required number of consent forms being submitted to
16 propose an amendment to the Master Declaration.

17 46. On December 21, 2020, the Shores HOA issued a memorandum regarding
18 the proposed amendment to the Master Declaration. This memorandum was sent to all
19 members of the Community and included an attached copy of the proposed First
20 Amendment to the Master Declaration.

21 47. The memorandum included consent forms which, when completed by a
22 homeowner and returned, counted as a “yes” vote for the Amendment.

23 48. The Shores HOA requested that the Community return the consent forms no
24 later than February 28, 2021.

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

27 50. The Shores HOA agreed to appoint an independent committee to work with
28 the Homeowners on drafting the short-term rental provision.

1 51. Despite this promise, a committee was never formed and the Homeowners
2 were never provided the promised opportunity to collaborate on the terms of the
3 Amendment.

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

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

10 54. Despite the knowing that the statements were false, the Shores HOA did not
11 notify the Community in any way that the statements were false or to correct what had been
12 published.

13 55. Another member of the Community will testify that Eileen Thompson,
14 President of the Cove HOA, lied to a resident of the Cove to secure his signed consent
15 form.

16 56. Specifically, in January, Ms. Thompson told Joe Whitman that the
17 Homeowners were offered a 7-day rental duration option that had been rejected and, based
18 on that misrepresentation, Mr. Whitman returned his signed consent form voting to approve
19 the Amendment.

20 57. This vote was significant because Mr. Whitman is a resident of the Cove, the
21 townhome community, which contains only 24 homes; Mr. Whitman’s vote was the
22 deciding vote that provided the sixty-seven percent (67%) majority.

23 58. Approval of the Amendment was secured, in large part, by false
24 representations by Rick Whipple, president of the Shores HOA and Eileen Thompson,
25 president of the Cove HOA.

26 59. On February 26, 2021, before the closing of voting, Section 2.30 of the
27 Declaration was amended (“Amendment”) to prohibit short-term rentals by restricting
28 leases to terms of more than thirty (30) days.

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60. The Amendment provides as follows:

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

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.

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

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

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

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

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

See, First Amendment attached as **Exhibit C**.

61. The Amendment was recorded on February 26, 2021 and will start being enforced on January 1, 2022.

62. On December 19, 2021, the Shores HOA sent out a newsletter addressing the enacting of the Amendment and the consequences for violating the same. The newsletter stated:

1 On Friday, December 17, the Shores board met in executive session with our
2 attorney Wendy Ehrlich for the purpose of obtaining legal advice regarding
3 enforcement of the short term rental restriction CC&R amendment. She will
4 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.*

5 *See*, Newsletter attached as **Exhibit D** (emphasis added).

6 Voting Procedure

7 63. On March 4, 2021, the Homeowners sent a letter to the Shores HOA
8 requesting copies of the consent forms for review.

9 64. This letter was also sent to all homeowners in the Community and set forth
10 the following concerns regarding how the consent forms were obtained:

- 11 a. Neighbors were told that the Concerned Homeowners were made an offer to
12 compromise and they refused when, in fact, no offer was ever made and no
13 discussion was actually had with the Concerned Homeowners.
- 14 b. The neighbors were never informed that the Concerned Homeowners
15 lowered the number of renters and hired a manager, Luisa Hyatt, to oversee
16 the rentals and handle complaints.
- 17 c. The letter called out the Shores HOA for repeatedly blaming issues with the
18 Community on the Concerned Homeowners without any support.
- 19 d. The Shores HOA never produced the “hundreds of complaint” it allegedly
20 received against renters in the Concerned Homeowners property.
- 21 e. Neighbors were falsely told that members of the Concerned Homeowners
22 were investors.
- 23 f. The neighbors were falsely told that there were hundreds of extra people in
24 the Community during the summer because of the Concerned Homeowners
25 rentals.
- 26 g. Neighbors reported that the tactics used by the Shores HOA to obtain consent
27 forms put bill collectors to shame.

28 *See*, 3/4/2021 Letter attached as **Exhibit E**.

1 76. Arizona law implies a covenant of good faith and fair dealing in every
2 contract. *See, Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (Ariz. 1986).

3 77. Arizona law recognizes that a party breaches the implied covenant of good
4 faith and fair dealing by (1) exercising express discretion in a way inconsistent with a
5 party's reasonable expectations and (2) by acting in ways not expressly excluded by the
6 contract's terms but which nevertheless bear adversely on the party's reasonable expected
7 benefits. *Id., see also, Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, 46 P.3d 431, 435
8 (Ct. App. 2002).

9 78. Defendants breached the duty of good faith and fair dealing by, among other
10 things: (1) Changing the benefits bargained for under the Master Declaration and
11 Townhome Declaration by adopting an amendment which was not authorized or properly
12 noticed by the Master Declaration and/or Townhome Declaration; (2) administering a vote
13 for adopting said amendment which failed to comply with the requirements of the Master
14 Declaration; and (3) Notwithstanding the improper vote administration, recording the
15 Amendment.

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

18 **WHEREFORE**, Plaintiffs hereby demand judgment in their favor and against the
19 Master HOA for:

- 20 (a) Breach of the covenant of good faith and fair dealing;
- 21 (b) Compensatory, incidental, and consequential damages in an amount
22 to be proven at trial, plus interest as allowed by law;
- 23 (c) Post-judgment interest at the statutory rate;
- 24 (d) Reasonable attorneys' fees and costs pursuant to A.R.S. § 12-341.01,
25 including attorneys' fees of not less than \$5000 pursuant to
26 Rule 55(b)(1) of the Arizona Rules of Civil Procedure in the event of
27 judgment by default in this action;
- 28 (d) Attorneys' fees and costs related to any collection effort of monetary

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damages due;

(e) Costs pursuant to A.R.S. § 12-341; and

(f) Such further relief as the Court may deem equitable and just.

COUNT III

(Declaratory and Injunctive Relief-Townhome HOA Only)

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

81. The Arizona Court of Appeals held that the Cove Townhome Declaration drafters clearly intended to allow short-term rentals with regard to the Cove. *Horton v. Hartsook*, 2009 Ariz. App. Unpub. LEXIS 974 (2009).

82. The Court of Appeals determination of drafter intent in *Horton v. Hartsook* necessarily requires that this Court declare the Amendment is invalid as a matter of law.

83. An invalid Amendment to a declaration is unenforceable under Arizona law.

84. Plaintiffs are entitled to a declaratory judgment that the Amendment to the Master Declaration is invalid and unenforceable as to the Townhomes in the Cove.

WHEREFORE, Plaintiffs hereby demand judgment in their favor and against the Townhome HOA for:

- (a) A declaratory judgment that the Amendment is invalid and unenforceable as a matter of law;
- (b) A declaratory judgment that the Townhome HOA is precluded from imposing penalties and enforcing the failure to pay penalties through liens or otherwise under authority purportedly created by the Amendment.
- (c) An injunction against the Townhome HOA enjoining the it from asserting any claim whatsoever to the Properties, or any part thereof, adverse to Plaintiffs;
- (d) An injunction against the Townhome HOA from attempting to enforce the Amendment against the Properties;

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- (e) Compensatory, incidental, and consequential damages in an amount to be proven at trial, plus interest as allowed by law;
- (f) Post-judgment interest at the statutory rate;
- (g) Reasonable attorneys' fees and costs pursuant to Section 10.16 of the Townhome Declaration, A.R.S. § 12-341.01, including attorneys' fees of not less than \$5000 pursuant to Rule 55(b)(1) of the Arizona Rules of Civil Procedure in the event of judgment by default in this action and Attorneys' fees and costs related to any collection effort of monetary damages due;
- (h) Costs pursuant to A.R.S. § 12-341; and
- (i) Such further relief as the Court may deem equitable and just

DATED this ____ day of January, 2022.

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

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BY _____
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15 Attorneys for Plaintiffs

16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
17 **IN AND FOR THE COUNTY OF NAVAJO**

18 GORDON GROSS and LILIANA
19 GROSS, husband and wife; 854 PINE
20 CREEK, LLC, an Arizona limited liability
21 company; BALD EAGLE RETREAT,
22 LLC, an Arizona limited liability company;
23 23621 VERRAZANNO BAY, LLC, an
24 Arizona limited liability company;
25 STEVEN A. KERNAGIS AND SANDRA
26 K. KERNAGIS, trustees of THE STEVEN
27 AND SANDRA KERNAGIS TRUST
28 DATED MARCH 17, 2014; THOMAS P.
ZEHRING AND JEANNETTE ROSE
ZEHRING, trustees of THE ZEHRING
LIVING TRUST DATED MARCH 1,
2001; JEANNETTE ZEHRING; 1501
RAINBOW VIEW, LLC, an Arizona
limited liability company; and LAKESIDE
FAMILY INVESTMENTS, LLC, an
Arizona limited liability company,

Plaintiffs,

v.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, INC., an
Arizona domestic nonprofit corporation;
and RAINBOW COVE AT THE SHORES
OWNERS ASSOCIATION, an Arizona
domestic nonprofit corporation;

Defendants.

No.:

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

1 Pursuant to Rule 65, Plaintiffs (collectively the “Homeowners”) respectfully request
2 that the Court enter a preliminary injunction against Defendants, The Shores at Rainbow
3 Lake Community Association, Inc. (“Master HOA”) and Rainbow Cove at the Shores
4 Owners Association, Inc. (“Townhome HOA”), from enforcing the Amendment¹
5 precluding short-term rentals throughout the Master Community. As set forth in the
6 Complaint, the Homeowners seek (among other relief) a declaration that the Amendment
7 is invalid, and an injunction against its enforcement by either the Master HOA or
8 Townhome HOA, because:

- 9 1) the Amendment implements a rental restriction already deemed contrary to
10 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;
- 11 2) the Amendment, being unenforceable within the Townhomes HOA, is
12 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
- 13 3) the Amendment is unenforceable under *Dreamland Villa Cmty. Club, Inc. v.*
14 *Raimey*, 224 Ariz. 42, 226 P.3d 411 (App. 2010) because it was not
15 reasonably foreseeable based on the language of the existing governing
16 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.

17 This Motion is supported by the following Memorandum of Points and Authorities and the
18 attached exhibits.

19 **Memorandum of Points of Authorities**

20 **I. Introduction**

21 The Homeowners are owners of real property located in The Shores at Rainbow
22 Lake (“Master Community”), who have been deprived of their right to lease their properties
23 by way of the Amendment to the Master Declaration. The Master Community is comprised
24 of various sections/tracts, some of which contain detached single-family homes (subject to
25

26 ¹ The “Amendment” refers to the First Amendment to Amended and Restated Declaration
27 of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake recorded with
28 the Navajo County Recorder at Instrument No. 2021-04383, 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”).

1 the Master Declaration) and some of which contain townhomes, including Rainbow Cove
2 at the Shores (“Townhome Community”) that is subject to the Townhome Declaration (as
3 well as the Master Declaration). The Amendment precludes short-term rentals throughout
4 the Master Community, including the Townhomes Community.

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

19 Here, the Homeowners satisfy the typical preliminary injunction standards:

- 20 (1) the Master HOA is threatening to enforce the Amendment,² which results in
21 irreparable injury as it deprives the Homeowners of the right to use their
22

23 ² As discussed below, the Master HOA is not only threatening to levy fines for violations
24 of the rental restriction, but it is also threatening to levy fines, **BEFORE ANY**
25 **VIOLATION OCCURS**, merely because someone has advertised rentals that would
26 violate the rental restriction. Thus, the Master HOA is not just threatening to enforce the
27 violation after-the-fact; it is also threatening to punish the thought of a violation. While
28 punishing the mere thought of wrongdoing may make an interesting story from a
philosophical perspective, it is one better told outside of this Court. *See* Dick, Philip K.,
The Minority Report, Vol. 4 of THE COLLECTED STORIES OF PHILIP K. DICK (Citadel
Twilight 1991). The fact that undersigned has all the charm of a *young* Tom Cruise does
not change that. *See* Spielberg, S. (Director), *Minority Report* [Film] (2002).

1 properties as they deem appropriate;³

- 2 (2) the Homeowners have a high likelihood of success on the merits;
- 3 (3) the Master HOA suffers essentially no harm if the Amendment is
4 preliminarily enjoined given that leasing has occurred without the rental
5 restriction for decades; and
- 6 (4) public policy generally favors protecting private property rights and, in any
7 event, by enacting A.R.S. §33-1817, the Legislature has determined that the
8 public policy of Arizona is to be protective as to amendments to HOA
9 documents.

10 There are two *additional* policy reasons supporting preliminary injunctive relief –
11 comity and judicial economy. The Arizona Supreme Court is currently considering a case
12 that involves the precise issues stated on page 2, above. *Kalway v. Calabria Ranch HOA,*
13 *LLC*, CV-20-0152-PR.⁴ At a minimum, the Court should enter a preliminary injunction
14 until the Supreme Court rules in *Kalway* so the Court does expend judicial resources where
15 the applicable legal rules could change.

16 II. Relevant Factual Background

17 The Homeowners are all owners of residential real property located in either the
18 Master Community. *See* Verified Complaint at ¶17. The Homeowners enjoy their
19 properties as second homes and use said properties for vacation and rental purposes only.
20 *Id.* at ¶18. The Homeowners and their properties are part of the Master Community, which
21 is a common-interest community that includes the Townhome Community along with other

22 ³ It is anticipated that Defendants may try to argue that the Homeowners do not face
23 irreparable harm because lost rental income and monetary fines/penalties could be
24 remedied by money damages later. However, where damages may be uncertain, monetary
25 damages are typically inadequate. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments*
26 *Ltd. P'ship*, 228 Ariz. 61, 65, 263 P.3d 69, 73 (App. 2011). Proving lost rental income is
27 speculative, particularly if advertising is punished as the Master HOA is threatening.

28 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.

1 tracts. *Id.* at ¶19.

2 The Master Community includes 164 single-family homes and is governed by the
3 Master Declaration. *Id.* at ¶20. Of the 164 single-family homes in the Master Community,
4 only 30 residents occupy the home full-time. *Id.* at ¶ 21. The Townhome Community is a
5 small community made up of 24 attached townhomes, located within the Master
6 Community, and is governed by the Townhome Declaration in addition to the Master
7 Declaration. *Id.* at ¶22. Only 2 of the 24 townhomes in the Townhome Community are
8 occupied by their owners full-time. *Id.* at ¶23.

9 The Townhome Declaration provides that the Townhome Community is subject to
10 the terms of the Master Declaration, which suggests that any amendment to the Master
11 Declaration would directly affect and bind homeowners in the Townhome Community. *Id.*
12 at ¶24. Section 2.30 of the Master Declaration, as originally recorded,⁵ does not in any way
13 prohibit or limit the ability of a homeowner to rent or lease their lots beyond the
14 requirements that owners must lease their entire lot and notify the Association of the lease
15 and terms thereof:

16 **Leasing of Lots.** No Owner may lease less than his entire Lot. Upon
17 leasing his Lot, an Owner shall promptly notify the Association of the
18 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.

19 *Id.* at ¶¶25 and 26. Further, Section 2.18 of the Master Declaration, a section defining
20 “Residential Use,” provides that leasing of a property by the owner shall not be considered
21 a trade or business. *Id.* at ¶27.

22 Vacation rentals are common in Navajo County because of the cool summers and
23 beautiful winters. *Id.* at ¶34. From the inception of the Master Community and the
24 Townhome Community, vacationers have been a mainstay of the community, often visiting
25

26 ⁵ Prior to the Master Declaration, the Master Community was governed by a prior
27 Declaration that was recorded with the Navajo County Recorder in 1986 at Docket No.
28 825, 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.

1 for short-term periods to experience the beauty and serenity of Pinetop. *Id.* at ¶35. On
2 information and belief, significant numbers of the homeowners in both the Master
3 Community and the Townhome Community have participated in short-term leasing. *Id.* at
4 ¶36. In fact, as noted by the Arizona Court of Appeals, the Townhome Community was
5 marketed for short-term vacation rentals for decades and were marketed as such by the
6 original developer. *Horton v. Hartsook*, No. 1 CA-CV 08-0095.⁶ The Homeowners, located
7 in both the Townhome Community and larger Master Community, have rented out their
8 homes as short-term rentals for years. *Id.* at ¶37. The ability to use short-term rentals as a
9 way to defray the cost of ownership was highly desirable to the Homeowners when they
10 purchased their respective homes or, at least, is highly desirable in their decision to
11 continue to own their homes. *Id.* at ¶38.

12 The vacation rental industry was revolutionized by the establishment of platforms
13 such as VRBO and Airbnb. These platforms allow homeowners to market their homes to
14 more potential renters by broadening the potential renter base and allowing for individuals
15 to rent their homes on a short-term basis – typically less than 30 days. *Id.* at ¶39. The
16 Homeowners purchased their respective homes because the Master Community was known
17 and held out as one that, not only allowed, but *encouraged* short-term rentals. *Id.* at ¶40.
18 Each of the Homeowners, as noted above, relies on the income from the short-term rental
19 of their home to ensure that they can meet the mortgage obligations for their property and
20 continue their ownership and enjoyment of said home. *Id.* at ¶41.

21 On August 15, 2020, the Master Association issued a straw ballot to the Community
22 to explore the Community’s interest in amending the Master Declaration to add a short-
23 term rental prohibition to the Declaration. *Id.* at ¶45. The ballot claimed that short-term
24 rentals cause increased noise, cars, and trash in the Master Community, but also provided
25

26 ⁶ In *Horton v. Hartsook*, the Court of Appeals also noted that the Townhome Declaration
27 and Master Declaration were virtually identical with respect to the leasing language. Given
28 the similarity of the language and the original intent noted by the Court of Appeals, it is
difficult how Defendants could dispute that the original intent under the Townhome
Declaration would be any different than the intent under the Master Declaration.

1 that short-term rentals were a good source of income for individuals who could not
2 otherwise afford to own their home. *Id.* at ¶46. The purpose of the straw poll was to assess
3 the Master Community’s attitude toward a potential short-term rental restriction in the
4 Master Declaration and stated that if at least sixty seven percent (67%) of the Community
5 was in favor, a vote would be held to amend the Declaration. *Id.* at ¶47. The tactics used
6 by both the Master HOA and the Townhome HOA were nothing short of guerrilla
7 marketing. *Id.* at ¶48. The underhanded strategy implemented by the Master HOA and the
8 Townhome HOA resulted in the required number of consent forms being submitted to
9 propose an amendment to the Master Declaration. *Id.* at ¶ 50.

10 On December 21, 2020, the Master HOA issued a memo regarding the proposed
11 amendment to the Master Declaration. This memo was sent to all members of the Master
12 Community and included an attached a copy of the proposed Amendment to the Master
13 Declaration. *Id.* at ¶51. The memo included consent forms which, when completed by a
14 homeowner and returned, counted as a “yes” vote for the proposed Amendment. *Id.* at ¶52.
15 The Master HOA requested that the Master Community return the consent forms no later
16 than February 28, 2021. *Id.* at ¶53.

17 On February 26, 2021, Section 2.30 of the Declaration was amended to preclude
18 short-term rentals by prohibiting any leases for a term of less than 30 days. *Id.* at ¶64. The
19 Amendment deleted the existing Section 2.30 and replaced it (in pertinent part) as follows:

20 2.30. Leasing of Lots.

21 (A) After December 31st, 2021, no Lot may be leased for a
22 term less than thirty (30) days.

23 (B) No portion of a Lot may be leased, other than the entire
24 Lot, and then only to a Single Family. For purposed of this Section
25 2.30, a Single Family may not consist of more than four (4)
individuals who are unrelated by blood, marriage or legal adoption.

26 *Id.* at ¶65. The Amendment was recorded on February 26, 2021 and went into effect on
27 January 1, 2022. *Id.* at ¶66. Since passing the Amendment, the Master HOA has threatened
28 to “strictly enforce” the Amendment by “monetary penalties [that] will be substantial.” *See*

1 December 2021 Newsletter at p.6. Further, the Master HOA has threatened at least of the
2 Homeowners that continued listing of a rental, without consummating a rental transaction,
3 would result in a hearing and “substantial” monetary penalties. See December 22, 2021
4 Letter.

5 **III. Legal Analysis**

6 Preliminary injunctive relief is appropriate where: “(1) there is a real threat of
7 irreparable injury not remediable by damages; (2) the threatened harm to the [movants]
8 weights more heavily in the balance than the actual injury to the [opponents]; (3) the
9 [movants] are likely to succeed in the trial on the merits and (4) public policy favors the
10 injunction.” *Burton v. Celentano*, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App. 1982)
11 (citing *Brennan Petroleum Products Co., Inc. v. Pasco Petroleum Co., Inc.*, 373 F.Supp.
12 1212 (D.Ariz. 1974)). The balance of hardships is the “critical element” and can be met by
13 demonstrating either (1) a combination of probable success on the merits and the possibility
14 of irreparable injury, or (2) the existence of serious questions going to the merits and the
15 balance of hardships tip sharply in the moving party’s favor. *Shoen v. Shoen*, 167 Ariz. 58,
16 63, 804 P.2d 787, 792 (App. 1990).

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

18 CC&RS, like the Master Declaration and Townhome Declaration, are contracts
19 under Arizona law. *Powell v. Washburn*, 211 Ariz. 553, 555, ¶8, 125 P.3d 373, 375 (2006).
20 A property owner who accepts a deed subject to restrictions assents to such restrictions and
21 is bound by them. *Duffy v. Sunburst Farms E. Mutual Water & Agric. Co., Inc.*, 124 Ariz.
22 413, 416, 604 P.2d 1124, 1127 (1980). Thus, where a conflict arises out of interpretation
23 of restrictive covenants, such as a declaration, the interpretation of such covenants is a
24 matter of law. Arizona has adopted the Restatement and its approach to interpreting such
25 covenants, which recommends that interpretation of restrictive covenants should give
26 effect to the intention of the parties, as determined by the language of the instrument, the
27 circumstances surrounding its adoption, and the purpose for which it was created. See
28 generally, *Powell, supra*.

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

4 As in *Armstrong*, to allow the generic amendment provision
5 present here to burden the homeowners' individual lots would
6 unreasonably alter the nature of the covenants, to which
7 implicit agreement was historically given. As in *Lakeland*, we
8 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.

9 *Dreamland*, 224 Ariz. at 51, ¶38, 226 P.3d at 420 (citations omitted). Therefore, the proper
10 inquiry is whether the owner to be bound had reasonable notice from the original
11 declaration that the particular covenant could be imposed without the owner's consent. *See*
12 *id*; *see also Kalway v. Calabria Ranch HOA, LLC*, 2020 Ariz. App. Unpub. LEXIS 281, at
13 *19, ¶24 (Div. 2 2020) (Unpublished memorandum decision) (Brearcliffe, J., dissenting).⁷

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

16 The Townhome Community, as noted above, is governed by the both the
17 Townhome Declaration and the Master Declaration. The Amendment changed only the
18 Master Declaration, but not the Townhome Declaration, presumably because the Master
19 HOA and Townhome HOA knew they could not impose a rental restriction by amending
20 the Townhome Declaration because such an amendment would unreasonably alter the
21 nature of the Townhome Declaration. As discussed above, the proper inquiry is whether
22 the Homeowners had proper notice that the Master HOA could impose a restriction without
23 their express consent. As to the Homeowners in the Townhome Community, they had no
24 such notice.

25 The Court of Appeals has already held that the Townhome Declaration could not be
26 interpreted to include a durational restriction upon lot leasing in *Horton v. Hartsook*. The
27 Court reasoned (among other reasons) that because the Townhome Declaration

28 ⁷ As noted above, this unpublished memorandum decision from the Court of Appeals is
currently pending before the Arizona Supreme Court.

1 indisputably allowed owners to lease their properties and imposed essentially no
2 restrictions upon leasing (other than to provide notice), the exclusion of any language or
3 provisions restricting lease provision indicated an intent to allow short-term leasing. *Id.* at
4 ¶15, 16. With regard to interpreting whether the Amendment can be applied in the
5 Townhome Community, the Court need not strain to determine the intent of the parties as
6 that determination has already been noted by the Court of Appeals in *Horton*.⁸

7 To be clear, *Horton v. Hartsook* establishes that the drafters of the Townhome
8 Declaration intended to not only allow short-term leasing but to *specifically* exclude the
9 possibility of restricting lease duration. *See Horton* at ¶¶15, 16, and 20. As a result, the
10 inquiry as to validity of the Amendment under *Dreamland* must necessarily conclude that
11 the Amendment would be invalid as to the Townhome Community. Any conclusion
12 otherwise would allow the Master Association to unreasonably alter the nature of the
13 Townhome Declaration by using the generic amendment power under the Master
14 Declaration, where the direct amendment to the Townhome Declaration would require
15 unanimous consent under *Dreamland*.

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

19 As a result of *Horton* and the discussion in Section III(A) above, the Amendment
20 applies to fewer than all of the lots of the Master Community. In that circumstance, A.R.S.
21 § 33-1817(A)(2) governs:

22 2. An amendment to a declaration may apply to fewer than all of the
23 lots or less than all of the property that is bound by the declaration and
24 an amendment is deemed to conform to the general design and plan
25 of the community, if both of the following apply:

26 * * * * *

27 (b) The amendment receives the affirmative vote or written

28 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. Additionally, it was
noted that the Hortons, who were the plaintiffs seeking to prohibit short-term leasing, had
leased a unit in the Cove on six different occasions for periods of one week. *Id.*

1 consent of all of the owners of the lots or property to which the
2 amendment applies.

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

12 Setting the statute aside (which is sufficient in itself), the Amendment fails under
13 the *Dreamland* analysis for reasons similar to that in the Townhome Community. The
14 Amendment unreasonably alters the Master Declaration as there was no such restriction or
15 notice of potential adoption of such a restriction in the original Section 2.30. The Master
16 Declaration (like the Townhome Declaration as noted in *Horton*) allowed for virtually
17 unlimited leasing subject to only 3 requirements: 1) owners must lease their entire lot; 2)
18 owners must notify the Master Association of lease commencement and termination dates;
19 and 3) owners must notify the Master Association of the names of each lessee or other
20 person who will be occupying the Lot during the lease term.

21 The drafters of the original lease provision language in the Master Declaration
22 clearly intended to not only allow leasing, but to allow leasing of *any* duration just as they
23 intended in the Townhome Declaration. No other conclusion can be legitimately reached
24 given the similarity of the language of those respective instruments as expressly noted by
25 the Court of Appeals in *Horton v. Hartsook*. Both required notice of a lease but had no
26 limitation on the terms of the lease itself. Thus, while leasing was clearly contemplated,
27 the drafters stopped short of prohibiting leases based on duration or any other terms of the
28 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

1 the leases for the owners' respective properties. The drafters certainly could have restricted
2 lease duration if they wanted to. But they did not, and that silence matters from a legal
3 perspective when gleaning intent.

4 If one accepts that the language indicates an intent to allow short-term leasing – the
5 Amendment fails under *Dreamland* for lack of proper notice to the minority that the Master
6 Declaration could be changed in such a substantial way by a vote of the majority.
7 Alternatively, the drafters were merely silent as to lease duration – the Amendment still
8 fails under *Dreamland* because the minority would have had no notice that the Master
9 Declaration could be changed by a vote of the majority to adopt an entirely new restriction
10 upon use to which the original document was silent. This is buttressed by the language of
11 the amendment provision itself, which does not provide notice that the existing restrictions
12 could be created from whole cloth. *See* Master Declaration at Section 9.2(A) of (allowing
13 for “amendments” to the Declaration or Project Plat). The language does not expressly
14 contemplate the addition of *entirely new restrictions* that did not exist before. *See Webb v.*
15 *Mullikin*, 142 S.W.3d 822, 828 (Mo. Ct. App. 2004) (holding that the phrase, “may amend
16 these restrictions,” permits change to existing covenants but *not* to add new or different
17 covenants).

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

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

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

1 portion of the Homeowners' respective property rights.

2 As the Court is aware, land is viewed as "unique" such that damages are usually
3 considered an inadequate remedy for the loss of land. *Woliansky v. Miller*, 135 Ariz. 444,
4 446, 661 P.2d 1145, 1147 (App. 1983). That is particularly the case where, as here, the land
5 is intended for personal use as opposed to merely for resale at a profit. *See id.* The
6 Amendment, by prohibiting a particular, important, and previously *allowable* use of their
7 property, infringes upon the Homeowners' rights to use and enjoy their property as they
8 see fit. Moreover, as noted above, many of the Homeowners may default on their
9 mortgages without the income derived from short-term rental of their respective properties.
10 To prohibit short-term rentals puts the Homeowners at risk of losing their homes altogether.
11 Thus, the Homeowners face losing either significant sticks from their proverbial "bundle"
12 or the "bundle" altogether.

13 Additionally, where damages may be uncertain, monetary damages may be
14 inadequate and injunctive relief appropriate. *IB Prop. Holdings, LLC*, 228 Ariz. at 65, 263
15 P.3d at 73. To determine whether monetary damages would be an adequate remedy at law,
16 the Court must consider the difficulty of proving the damages with reasonable certainty.
17 *Id.* (citations omitted). Imposition of the Amendment and a failure to enjoin the Master
18 HOA and Townhome HOA will certainly result in lost rentals. Calculating those monetary
19 damages is an uncertain proposition particularly because the Master HOA is threatening
20 fines for merely advertising short-term rentals. If the Homeowners cow-tow to the Master
21 HOA's threat, there is no way to determine how many potential rentals were even lost.

22 **E. Public policy supports a preliminary injunction.**

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

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1 above, there are two additional policy reasons supporting preliminary injunctive relief –
2 comity and judicial economy. At a minimum, the Court should enter a preliminary
3 injunction that stops enforcement of the Amendment until the Supreme Court rules in
4 *Kalway*, at which point the parties can supplement briefing to the Court. After that, the
5 Court can set a hearing so the Court does expend judicial resources conducting a hearing
6 where the applicable legal rules could change or be clarified during the pendency of this
7 case.

8 **IV. Conclusion**

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

16 DATED this ____ day of January, 2022.

17 **DYER BREGMAN & FERRIS, PLLC.**

18
19 BY _____
20 Stockton D. Banfield
21 Charles M. Dyer
22 Attorneys for Plaintiff

23 **WONG & CARTER, PC.**

24 BY _____
25 Rick K. Carter
26 Matthew A. Klopp
27 Attorneys for Plaintiff

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Matthew A. Klopp

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Please Respond to Phoenix

February 17, 2022

Via Certified Mail, R.R.R.

Via Certified Mail (without R.R.R.)

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, INC.

Attn: Richard Whipple

826 Pine Creek Circle

Lakeside, Arizona 85929

Re: Notice and Demand to Quiet Title

First Amendment to the Shores Declaration (Instrument No. 2021-04383)

To Whom It May Concern,

Please be advised that our firm has been retained by Ronald Douglas Kyer, Jr. and Desiree Kyer (the "Homeowners") to quiet title to their property located at 2355 Lake Shore Drive, Lakeside, and more particularly described as Lot 51, THE SHORES AT RAINBOW LAKE, according to Book 16 of Maps, pages 21-27, records of Navajo County, Arizona. This Notice and Demand relates to the prior Notice and Demand, dated January 7, 2022, sent to you by our office and is sent in anticipation of seeking leave to amend the pending Complaint, captioned as *Gross, et al. v. The Shores at Rainbow Lake Community Association, Inc.*, and docketed by the Navajo County Superior Court as Case No. S0900CV202200042 ("the Lawsuit").

On February 26, 2021 the Shores at Rainbow Lake Community Association, Inc. (the "Master HOA"), recorded that certain First Amendment to the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake, with the Recorder of Navajo County, Arizona at Instrument No. 2021-

04383 ("the Amendment"). The Amendment requires, among other things, that all leases of property within the Shores at Rainbow Lake community exceed 30 days, thus prohibiting short-term rentals (the "Amendment"). That Amendment is invalid under Arizona law and cannot be enforced by the Master HOA for various reasons as discussed in the Complaint and Motion for Preliminary Injunction filed in the Lawsuit (which was already served upon the Master HOA).

Therefore, the Homeowners demand that the Master HOA's Board of Directors take prompt action to clear title to their property of the wrongful Amendment. Should the Board of Directors refuse to comply with this demand, the Homeowners will request leave to join the Lawsuit and seek all relief prayed for in the Complaint.

Enclosed is a proposed instrument to invalidate the Amendment that can be recorded with the Navajo County Recorder's Office. If the enclosed instrument is not executed and returned to our office within twenty (20) days of this letter, the Homeowners will seek leave to amend the Complaint filed in the Lawsuit to include the Homeowners as additional plaintiffs. Finally, as required by statute, enclosed is a \$5.00 check made payable to The Shores at Rainbow Lake Community Association, Inc. in connection with the statutory demand for execution of the instrument.

As a courtesy, we have sent a copy of this letter and the attachments to counsel for the Master HOA. We look forward to your prompt response and cooperation.

Sincerely,
WONG 和 CARTER, P.C



Matthew A. Klopp

Encls. (Quitclaim Deed and Notice of Invalidity; Chk. No. 1716)

Cc: Wendy Ehrlich (via email- wehrlich@comcast.net-and regular mail)
9671 North Horizon Vista Place
Oro Valley, Arizona 85704

When recorded, return to:
Wong & Carter, P.C.
3003 North Central Avenue Suite 1000
Phoenix, Arizona 85012

**QUITCLAIM DEED
AND NOTICE OF INVALIDITY**

NOTICE IS HEREBY GIVEN that the First Amendment to the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake, recorded with the Recorder of Navajo County, Arizona at Reception No. 2021-04383 (the "First Amendment") on February 26, 2021, which purports to amend the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake recorded at Instrument No. 2001-17716 on September 6, 2001, which First Amendment affects the legal and/or equitable interest of the fee owners of that certain real property situated in Navajo County, Arizona more particularly described in the foregoing instruments, is invalid and unenforceable as a matter of law. Therefore, no right, title, or interest is created, nor is any conveyance or encumbrance granted, by the First Amendment to any party.

Dated this ___ day of _____, 2022.

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, INC.,
an Arizona non-profit corporation

By: _____
Its: _____

STATE OF ARIZONA)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 2022 by _____, the _____ of THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation.

Notary Public

My Commission Expires:

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COMPLETE THIS SECTION ON DELIVERY

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 R Whipple Agent
 Addressee

B. Received by (Printed Name) R Whipple C. Date of Delivery 2/22/22

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

Article Addressed to:
The shores at Peinles Lake
Community Association, Inc.
Attn: Richard Whipple
826 Pine Creek Circle
Lakeside, AZ 85929



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