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10 **THE SUPERIOR COURT OF ARIZONA**
11 **COUNTY OF NAVAJO**

12 Gordon Gross and Liliana Gross, husband
and wife *et al.*,

13 Plaintiffs,

14 vs.

15 The Shores at Rainbow Lake Community
16 Association, an Arizona nonprofit
corporation,

17 Defendant.

Case No.: S0900CV202200042

**OBJECTION TO FORM OF
JUDGMENT**

18 In the Court's September 14, 2022 order, the court provided a decision on the cross-
19 motions for Partial Summary Judgment that addressed the issue of contractual validity of four
20 separate sections of the 2021 Amendment. The Motions for Partial Summary Judgment left other
issues for subsequent consideration.

21 The Court granted summary judgment in favor of Defendant on Sections 2.30(B), (C)
22 and (D) of the 2021 Amendment. The Court found 3 out of 4 of the contested sections of the
23 2021 Amendment are contractually valid.

24 The Court granted summary judgment in favor of Plaintiffs on Section 2.30 (A) of the
25 2021 Amendment. This one section of the 2021 Amendment, consisting of one 18-word
26 sentence, was found contractually invalid.

1 The Court, in its discretion, denied Defendant’s request for attorney fees. The Court did
2 not grant or deny fees to Plaintiffs because Plaintiffs’ Motion did not include a request for such
3 relief and because Plaintiffs prevailed only with regard to 18 words found in the 2021
4 Amendment, with Defendant prevailing on the majority the issues.

5 **A. Granting Portions of Cross Motions for Partial Summary Judgment**
6 **Did Not Automatically Resolve Entire Dispute**

7 Without something more, an order granting of cross-motions for *partial* summary
8 judgment would not, on its face, resolve the entire dispute. In this case, the contractual validity
9 of the 2021 Amendment raised in the cross-motions for partial summary judgment would not
10 resolve all of the allegations of the Complaint.

11 Under the allegations entitled “Improper tactics used to ‘Pass’ the Amendment” at p. 6
12 of the original Complaint, p. 7 of First Amended Complaint, Plaintiffs alleged certain
13 misstatements, misrepresentations and false statements were made during the voting process
14 that could render invalid even a contractually valid amendment. Plaintiffs claimed the 2021
15 Amendment was “invalid and unenforceable because it was passed without compliance *with*
16 *the procedures required under the Master Declaration* and Arizona law.” Original complaint,
17 para 74, First Amended Complaint, para 75. Plaintiffs also alleged to have suffered
18 “compensatory, incidental and consequential” monetary damages of an undisclosed
19 amount. Complaint, p. 14, para. (b), First Amended Complaint, p. 14, para. (b). Plaintiffs’
20 claims for monetary damages were not addressed in the Motion for Partial Summary Judgment.
21 The decision on the Cross-Motions did not resolve the entire case.

22 **B. Plaintiffs’ Stipulation to Dismiss Remaining Claims**

23 However, Plaintiffs now agree to end this litigation in its entirety. Plaintiffs request entry
24 of a Rule 54(c) final judgment. By making this request, Plaintiffs agree “that no further matters
25 remain pending,” which requires the dismissal of all remaining claims alleged or asserted in
26

1 the Complaint and First Amended Complaint, including those claims based on alleged
2 irregularities with the voting procedures and Plaintiffs' claim for monetary damages.

3 Plaintiffs' agreement and their judicial admission that "no further matters remain
4 pending" is accepted by Defendant.

5 To be clear as to the dismissal of all remaining claims, Defendant requests the Court
6 expressly dismiss all remaining claims by including language that states: "All other claims
7 Plaintiffs alleged or that Plaintiffs could have asserted in this litigation are dismissed with
8 prejudice."

9 **C. In its request for Judgment, Plaintiff seeks Rule 56(c) finality.**

10 To provide that finality, the Court may accept Plaintiff's form of judgment and this
11 objection to form of judgment as Plaintiffs' and Defendant's agreement and stipulation to
12 Plaintiffs' offer to dismiss Plaintiff's remaining claims based on alleged misrepresentations and
13 false statements made during the election period or otherwise.

14 Defendant request the following language be added to the form of judgment:

15 "All other claims Plaintiffs alleged or that Plaintiffs could have asserted in this
16 litigation are dismissed with prejudice."

17 A form of judgment is lodge with this Objection as Exhibit No. 1.

18 **D. Plaintiff's Post-Decision Fee Application is Improper.**

19 In Plaintiffs' April 25, 2022 Motion for Partial Summary Judgment, Plaintiff did not
20 include a request for attorney fees. In the Court's order, Defendant prevailed as to 3 out of 4 of
21 the provisions in the 2021 Amendment, with Plaintiffs prevailing only as to 1 out of 4 of the
22 provisions Plaintiffs claimed were invalid. The Court exercised its discretion and denied
23 Defendant's request for attorney fees as made in Defendant's Cross-Motion. Fees are not proper
24 to Plaintiffs because they were not sought in the Motion, were not awarded in the Order and
25 because Defendant was the prevailing party on most of the challenged sections of the 2021
26 Amendment, and also has now prevailed in regard to Plaintiffs' claim for monetary damages.

1 **1. Must Request Fees at Each Stage of Litigation.**

2 When granting, in part, the relief sought in Plaintiffs’ April 25, 2022 Motion for
3 Partial Summary Judgment, the Court could not grant relief that was not requested. For that same
4 reason, the Court cannot enter judgment granting relief that was not requested in the Motion.
5 King v. Titsworth, 221 Ariz. 597 (App. 2009); Wagenseller v. Scottsdale Memorial Hospital,
6 147 Ariz. 370 (1985).

7 A party must include a request for the Court to grant fees *at each stage of the*
8 *litigation*. Plaintiff’s failure to include a request for attorney fees in the April 25, 2022 Motion
9 prevents the Court from including this relief in an order or judgment granting the Motion. The
10 Wagenseller Court explained this requirement as follows:

11 These exceptions [to the American rule that each party pay its own fees] are
12 commonly intended (1) to encourage private enforcements of public laws by
13 victims, (2) to discourage non-meritorious litigation, (3) to encourage a just claim
14 or a just defense, or (4) to promote settlement of disagreements out of court. . . .
15 unless each party is on notice before each stage of the lawsuit that its opponent
16 intends to ask for attorney’s fees, the last purpose cannot be served. To this end,
17 and to spare courts from considering each case twice – once on the merits and once
18 on the question of fees – Local Superior Court Rule 3.7(e) and Appellate Rule 21(c)
19 require notice of the fee request before trial or submission of the appeal respectively

20 Although Maricopa Superior Court Local Rule 3.7 mentioned in Wagenseller has
21 been amended since the Wagenseller decision, so too has Rule 54(g) of the Arizona Rules of
22 Civil Procedure. Thus, the reasoning still holds true. This was explained in King v. Titsworth:

23 The policy underlying our fee-shifting statutes also supports our holding here. Our
24 Supreme Court has stated that one of the purposes of fee-shifting statutes is to
25 “promote settlement of disagreements out of court” and that “[u]nless each party is
26 on notice *before* each stage of the lawsuit that its opponent intends to ask for
attorney[s’] fees, [that] purpose cannot be served.” * * * Accordingly, if we were
to uphold the trial court’s award of fees in this case, the Kings would have been
unfairly deprived of the opportunity to “accurately assess the risks and benefits of
litigating vs. settling.”

King v. Titsworth, 221 Ariz. at 600.

1 Because Plaintiffs did not include a request for attorney fees in their Motion and
2 therefore *before* the Defendant filed its response to the Motion, the purpose of fee-shifting
3 statutes cannot be served and the Courts cannot uphold the granting of a fee request made after
4 the Motion is decided. *See also Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 11 (App. 2013) (the
5 “purpose of promoting early settlement” not served where defendant prevailed on motion to
6 dismiss but requested fees only after prevailing on motion).

7 **2. Defendant is the Prevailing Party.**

8 Although Plaintiffs’ obtained the Court’s decision that 1 out of 4 sections in the
9 2021 Amendment was not enforceable, the Court found Defendant prevailed on most (3 out of
10 4) of the contested sections of the Amendment. With the entry of the Rule 56(c) judgment,
11 Defendant also prevailed on Plaintiffs’ claims of voting irregularities and their claims for
12 monetary damages.

13 In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the U.S. Supreme Court held “the
14 most critical factor is the degree of success obtained.” The Arizona courts follow the same rule.
15 *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 38 (App. 1990) (“The trial court may rightfully
16 utilize a ‘percentage of success factor’ or a ‘totality of the litigation’ test[.]”). Because
17 Defendant prevailed on the 3 out of 4 of the provisions Plaintiffs claimed were invalid and
18 because Defendant prevailed on the issues of voter irregularities and prevailed as to Plaintiffs’
19 claim for monetary damages, the degree of Defendant’s success is greater than the degree of
20 Plaintiff’s success. Plaintiffs’ limited success on one of many issues and claims alleged in the
21 pleadings or asserted in the Motion, when compared to Defendant’s much greater degree of
22 success, is insufficient to label Plaintiff the prevailing party.

23 **CONCLUSION**

24 Without Plaintiffs’ judicial admission and agreement to dismiss Plaintiffs’ claims arising
25 out of the alleged voting irregularities and Plaintiffs’ claims for monetary damages, the order
26

1 determining the issues raised in Cross-Motions for Partial Summary Judgment would not have
2 resolved all issues and would not be recognized as final under Rule 54(c).

3 With Plaintiffs' agreement that all other claims Plaintiffs asserted in the original and
4 Amended Complaint are to be dismissed with prejudice, the Court's determination of the validity
5 of 3 out of 4 of the sections of the 2021 Amendment can be inserted into a final Judgment.

6 Based on the totality of this litigation, Defendant is the prevailing party. Moreover,
7 Plaintiffs' Motion did not mention or request an award of attorney fees.

8 A proper form of Judgment is lodged with this Objection as Exhibit No. 1.

9 DATED this 24th day of October, 2022.

10 JENNINGS HAUG KELEHER MCLEOD LLP

11 /s/ James L. Csontos

12 Jack R. Cunningham

13 James L. Csontos

14 Attorneys for The Shores at Rainbow Lake
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15 Copy of the foregoing mailed
16 and emailed this 24th day of October 2022, to:

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