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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

MOTION FOR NEW TRIAL

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19 Pursuant to Rule 59, Arizona Rules of Civil Procedure, Defendant requests the Court
20 amend the Judgment (entered by the Clerk on December 6, 2022) because (1) the Judgment
21 renders unenforceable all four sections of the First Amendment, but the September 14, 2002
22 Order found three out of the four sections to be enforceable, (2) the Judgment fails to address
23 what happened to Plaintiffs' other claims, such as were they dismissed with or without prejudice
24 or otherwise terminated and (3) The September 14, 2022 Order's analysis of how the First
25 Amendment re-defined the phrase "Single Family" was foreseeable applies equally to the
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1 foreseeability of how the First Amendment changed the original definition that all leasing was
2 not considered a business to all leasing -other than transient lodging defined as 30 days or less-
3 is not considered a business.

4 **MEMORANDUM OF POINTS AND AUTHORITIES.**

5 **I INTRODUCTION**

6 **A. Results of September 14, 2022, Order**

7 The Court's September 14, 2022, Order addresses the contractual enforceability of the
8 2021 First Amendment to the 2001 Covenants. The Court's Order granted summary judgment
9 in Defendant's favor and found three out of the four sections of the First Amendment.¹ The
10 Court granted summary judgment in Plaintiffs' favor regarding one of the four sections of the
11 First Amendment.² The Order also addressed and denied the request for attorney fees stated in
12 Defendant's Cross-Motion. The Court's Order *did not state* the Court found the entire First
13 Amendment to be invalid. The Court's Order resolved all issues raised in the Motion for Partial
14 Summary Judgment and Cross-Motion but did not decide or dispose on the merits Plaintiffs'
15 remaining claims alleged in the Complaint.

16 Plaintiffs' Complaint included other claims in addition to their challenge of contractual
17 enforceability. Plaintiffs' other claims included their claim that the enforceable sections of the
18 First Amendment were rendered unenforceable due to alleged inappropriate conduct during the
19 voting and Plaintiffs' claims for monetary damages. Because Plaintiffs' remaining claims were
20 not addressed or resolved by the Court's September 14, 2022, Order, the litigation was not ready
21 for the entry of a Rule 54(b) or Rule 54(c) judgment.

22 **B. Plaintiffs' Agreement to Dismiss Remaining Claims.**

23 On October 4, 2022, Plaintiffs indicated an intent to dismiss all other claims. This
24 indication was when Plaintiffs stipulated the Court could enter a judgment containing language

25 ¹ Sections 2.30 (B), (C) and (D) enforceable.

26 ² Section 2.3(A) not enforceable.

1 found in Rule 54(c). The Court can consider Plaintiffs’ request as a Motion or by the Stipulation
2 of all parties. On October 24, 2022, Defendants stipulated to the Court’s dismissal of Plaintiffs’
3 other claims asserted. *See* October 24, 2022, Objection to Form of Judgment, pp. 2-3.

4 With Plaintiffs’ other claims to be addressed by a stipulated order of dismissal, Defendant
5 promptly lodged an appropriate form of Judgment that concluded the claims addressed in the
6 Court’s September 14, 2022, Order and adjudicated the other claims addressed by the stipulation
7 to dismiss all other claims. *Id.*

8 On November 10, 2022, the Court asked Plaintiffs if they were “in fact abandoning all
9 claims not addressed in the Motion and Cross-Motion for Summary Judgment.” In a Notice
10 dated November 23, 2022, Plaintiffs responded by listing several other claims alleged in the
11 Complaint that were not resolved by summary judgment. Plaintiffs stated why they would not
12 pursue those claims. But Plaintiffs incorrectly claimed their other claims could go without
13 decision or disposition by the Court if there was a recitation of Rule 54(c) language.³ *See* Notice,
14 p. 2. Plaintiffs stated Plaintiffs “would, in fact, be voluntarily dismissing those other claims not
15 addressed in the Motion and Cross-Motion for Summary Judgment. *Id.*, p. 2, lines 14-15. No
16 mention was made if the dismissal would be with or without prejudice.

17 **II. LEGAL ANALYSIS.**

18 **A. The Court’s Order did not render the Entire First Amendment Invalid**

19 The Court’s September 14, 2022, Order granting, in part, both parties’ Motions for Partial
20 Summary Judgment, states one of the four sections of the First Amendment was contractually
21 unenforceable because the change was not foreseeable. That section was 18 words long. The
22 Order stated the other three of the four sections were enforceable. After entry of the Order,
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24 ³ Because the Court’s November 10, 2022 Minute Entry stated “No response by defendant
25 is authorized at this time,” Defendant did not earlier address how Plaintiffs failed to disclose or
26 discuss the legal authorities on point, all of which require the Court to decide and dispose of
every claim on the merits and to state the dismissal is with prejudice.

1 Plaintiffs subsequently agreed all other claims alleged in the Complaint would be dismissed,
2 requiring the conclusion that no further claim of invalidity existed.

3 The Court’s Order did not state the *entire* First Amendment was unenforceable. There is
4 no legal basis to find the entire First Amendment unenforceable. For example, the Arizona
5 Supreme Court in [Kalway](#) found almost all of the sections of the amendment to be unenforceable
6 but did not find the entire amendment invalid. Instead, the Arizona Supreme Court stated the
7 blue-pencil method must be applied to strike any unenforceable language, leaving the remaining
8 amendment enforceable. *See*, below.

9 Plaintiffs’ request the Court expand from its Order finding 3 out of 4 sections of the First
10 Amendment to be enforceable and enter a Judgment finding the entire First Amendment
11 unenforceable is contrary to the “blue pencil” rule required by [Kalway](#) and is contrary to the 2001
12 Covenants, which provide at Section 9.4:

13 **Severability.** Any determination by any court of competent jurisdiction that any
14 provision of this Declaration is invalid or unenforceable shall not affect the validity
15 or enforceability of any of the other provisions hereof.

16 In [Kalway v. Calabria Ranch HOA, LLC](#), 252 Ariz. 532, 537 ¶ 8 (2022) the Court held
17 “If an amendment is invalid, we ‘blue pencil’ the amended CC&Rs, striking severable
18 provisions.” The Court then applied the blue pencil rule to “strike unauthorized terms from
19 several amendments”. [Kalway](#) 252 Ariz. 532, 539, ¶ 21.

20 This Court is respectfully requested to ignore Plaintiffs’ unsupported claims to the
21 contrary and adhere to the Arizona Supreme Court’s directions. If the Court finds the 18-word
22 long Section 2.30(A) is not enforceable, the court must “‘blue pencil’ the amended CC&Rs,
23 striking severable provisions.” [Kalway](#), 252 Ariz. at 537, ¶ 8. The form of Judgment Defendant
24 lodged on October 24, 2022, purposely complies with the “blue pencil” rule used by the Arizona
25 Supreme Court in [Kalway](#).

1 **B. The Court must grant or dismiss all claims**

2 A Judgment is final when it "decides and disposes of the cause on its merits, leaving no
3 question open for judicial determination." *Powell v. Pac. Specialty Ins. Co.*, 243 Ariz. 536, 415
4 P.3d 804 (App. 2018), subsequently depublished and available at [2018 WL 2635173](#), [2018 Ariz.](#)
5 [App. Unpub. LEXIS 919](#), quoting *Decker v. City of Tucson*, 4 Ariz. App. 270, 272 (1966); see
6 also *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 14, (App. 2009) ("Whether an order is final and
7 appealable depends not on its form but on 'its substance or effect.'")

8 The inclusion of Rule 54(c) language is an *additional* requirement as to the form of the
9 judgment but is not a substitute requirement for the judgment actually deciding and disposing
10 of all claims on the merits.⁴ Without the proper form *and* the proper substance, a Judgment is
11 not final, subject to execution, or appealable. *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236
12 Ariz. 221, 224 ¶ 6 (App. 2014) ("As statement that a judgment is final pursuant to Rule 54(c)
13 when, in fact, claims remain pending does not make a judgment final and appealable.")

14 In *Madrid*, the judgment on appeal contained proper Rule 54(c) language just as this
15 Court's December 6, 2022, Judgment contains. But the *Madrid* Court found "some claims
16 remain to be resolved," which required the determination the judgment was not final, and the
17 Court of Appeals lacked jurisdiction. The appeal was dismissed.

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21 ⁴ [Brumett v. MGA Home Healthcare, L.L.C.](#), 240 Ariz. 420, 426 (App. 016) (Stating "the
22 inclusion of Rule 54(c) language does not render an otherwise non-appealable order or judgment
23 appealable as a final judgment."); *Steve Heathcott Arabians, LLC v. Griffith*, [2017 WL 6616371](#),
24 [2017 Ariz. App. Unpub. LEXIS 2012](#), at *3 n.3 (App. 2017) (Judgment containing Rule 54(c)
25 language "did not create grounds for appeal because claims remained pending in the superior
26 court."); *Cold Fusion Lighting, LLC v. Verde Wellness Ctr., Inc.*, [2018 WL 5269740](#), [2018 Ariz.](#)
[App. Unpub. LEXIS 1512](#), at *4-5 (App. 2018) ("Although the court certified the judgment as
"final" in accordance with Civil Rule 54(c), the inclusion of finality language under these
circumstances does not transmute an otherwise non-appealable judgment into an appealable
one.")

1 In this action, Plaintiffs alleged other claims in their Complaint. There has not been a
2 “judicial determination” of those claims as required by Decker v. City of Tucson. See also In re
3 Marriage of Zale, 193 Ariz. 246 (1999) (quoting and applying Decker v. City of Tucson.)

4 The Court did not make a determination about what happened to Plaintiffs’ claim there
5 were voting irregularities that rendered the First Amendment invalid. The Court did not dispose
6 of Plaintiffs’ claim for “compensatory, incidental and consequential” monetary damages.
7 Typically, when parties submit a stipulation to dismiss pursuant to Rule 41, Ariz. Rules of Civ.
8 Proc., the parties ask the Court to enter an Order or Judgment of Dismissal. But Plaintiffs argued
9 this Court should not decide or dispose of Plaintiffs’ other claims.

10 If Plaintiffs’ other claims were dismissed, it is important to know if the claims were
11 dismissed with or without prejudice. Unless the Court’s order or judgment states “with
12 prejudice,” a dismissal is presumed to be without prejudice. See Rule 41 (“Unless the order
13 states otherwise, a dismissal under this Rule 41(a)(2) is without prejudice.”)

14 If Plaintiffs’ other claims were dismissed without prejudice, a final judgment cannot be
15 entered. This is because “. . . an order dismissing without prejudice is not a final judgment
16 because the plaintiff can refile the action.” Workman v. Verde Wellness Ctr., Inc., 240 Ariz. 597,
17 ¶ 7 (App. 2016).

18 Contrary to Plaintiffs’ request to leave their other claims in limbo, the Court *must* decide
19 and dispose of all claims on their merits when entering a final judgment. Decker v City of Tucson.
20 The form of Judgment lodged by Defendant contains a judicial determination on Plaintiffs’ other
21 claims, expressly and unequivocally deciding and disposing of all claims on their merits. The
22 form of Judgment lodged by Defendant complies with the Court of Appeals’ opinion in Decker
23 v. City of Tucson and the Arizona Supreme Court’s opinion in In re Marriage of Zale.

24 Defendant requests this Court enter a final judgment that expressly and unequivocally
25 decides and disposes of all claims on their merits. The form of Judgment Defendant lodged on
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1 October 24, 2022 (shortly after Plaintiffs first stated an agreement to dismiss all other claims)
2 includes a proper judicial determination.

3 **C. Re-defining Terms is Foreseeable.**

4 In the Court’s September 14, 2022, Order, the Court looked at how the 2001 Covenants
5 defined the term “Single Family” and concluded placing the definition in the Covenants
6 provided “sufficient notice to future owners that the Association intends to be able to define the
7 term in the future.” See Order, p. 12.

8 As Section 2.18, the 2001 Covenants define “the leasing of a residence by the Owner
9 thereof shall not be considered a trade or business within the meaning of this section.” That
10 definition could have just as easily stated that leasing *is* considered to be a trade or business and
11 not allowed within the Association.

12 The 2021 First Amendment had the effect of carving out transient lodging (defined by
13 statute as being 30-days or less) from the blanket definition that any leasing was not “a trade of
14 business.” Because the Association defined leasing as not a trade or business in the 2001
15 Covenants that provided “sufficient notice to future owners that the Association intends to be
16 able to define the term in the future.” In other words, if the owners could have voted to amend
17 the definition of “the leasing of a residence by the Owner thereof shall ~~not~~ be considered a trade
18 or business within the meaning of this section” by removing the “not,” the Owners can amend
19 the definition by omitting transient lodging from what is “not considered a trade or business.”

20 The Court’s Order also found “Because the 2001 declaration restricts activities and use
21 of property by Owners it is foreseeable that the CC&R might be amended to clarify who would
22 be responsible for violations by the lessees and how the owners/lessors would be contacted as
23 was done in Section 2.30(C).”

24 At Section 2.30, the 2001 Covenants required an owner to “notify the Association of the
25 commencement date and termination date of the lease[.]” The Association had the “right to limit
26 the number of guests and invitees who may use the Common Area at any one time[.]” Because

1 the 2001 Covenants required the reporting of lease durations and allowed the Association to
2 restrict the use of Common Areas, it was foreseeable that the Covenants may be amended to
3 address the duration of a lease if lease duration became an issue in the usage of the common
4 areas (and the cost to the Association of maintaining enforceable common areas).

5 For these reasons, Defendant respectfully requests the Court to determine sufficient
6 notice to future owners that the Association intended to be able to redefine the type of leasing
7 that was not improper trade or business to address the impact on Common Areas caused by the
8 increased availability of tenants under the short-term leasing platforms. Defendants request the
9 Court determine Section 2.30(A) of the 2021 First Amendment is contractually enforceable.

10 III. CONCLUSION

11 Defendant does not want error to sneak into this action or into the final Judgment.
12 Because [Kalway](#) held the blue-pencil rule applies, Defendant complied and lodged a form of
13 judgment using the same blue-pencil method required by the Arizona Supreme Court. Because
14 the Arizona Supreme Court and Courts of Appeal have held a Rule 54(c) finding is not a
15 substitute for an actual judicial determination of each claim asserted, Defendant lodged a form
16 of Judgment that included such a judicial determination of all claims. Complying with the
17 Arizona Supreme Court's and Courts of Appeals' holdings is important. "Any other rule would
18 lead to chaos in our judicial system." [Francis v. Arizona Department of Transportation](#), 192
19 Ariz. 269, 271 (App. 1998). Defendant requests the Court amend its judgment (or use the form
20 of Judgment lodged by Defendant) to utilize the blue-pencil rule and to adjudicate all of
21 Plaintiffs' claims.

22 Defendant also respectfully requests the Court reconsider its decision on the
23 unenforceability of Section 2.3(A) of the First Amendment and determine, for the same reasons
24 other sections of the First Amendment were found enforceable, Section 2.3(A) is enforceable.
25 If the Court determines the 18-word Section 2.30(A) found in the First Amendment is
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1 foreseeable and not untethered from the 2001 Covenants, Defendant will lodge an appropriate
2 form of Judgment.

3 DATED this 20th day of December, 2022.

4 JENNINGS HAUG KELEHER McLEOD LLP

5
6 /s/ James L. Csontos

7 Jack R. Cunningham

8 James L. Csontos

9 Attorneys for The Shores at Rainbow Lake

Community Association,

10 Copy of the foregoing mailed
11 and emailed this 20th day of December 2022, to:

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