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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

GORDON GROSS and LILIANA GROSS, husband and wife, *et al.*, Plaintiffs, v. THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, an Arizona nonprofit corporation, Defendant.	No.: S0900CV202200042 RESPONSE TO MOTION FOR NEW TRIAL (Hon. Michala M. Ruechel)

Plaintiffs submit this Response to the Motion for New Trial filed by Defendant. As discussed more fully below, the Motion should be denied. The Court is well aware that it ordered Defendant to lodge a form of final judgment, which Defendant completely disregarded. Defendant thus waived its right to be heard as to its preferred form of final judgment for all the reasons set forth in Plaintiffs' prior filings. Regardless of Defendant's recalcitrance, the Final Judgment ultimately entered by the Court *expressly* permits Defendant to record a new restrictive covenant provided such recording is consistent with the Court's September 14, 2022 Ruling. Defendant can therefore record a "blue-penciled" version of the First Amendment (as it is asking the Court to do now) provided Defendant's

recording is consistent with the Court's Ruling. Why Defendant does not simply avail itself of what the Final Judgment permits, as opposed to filing the Motion, is more than unclear.

As for the "remaining claims," i.e., Count II of Plaintiff's Amended Complaint, the Final Judgment contains Rule 54(c) language of finality as to all claims. The record is clear as to how that claim was adjudicated. It is not necessary for a judgment to recite the outcome of every, single cause of action that may have initially been asserted so long as all claims are addressed before the Court enters Rule 54(c) finality language. It is somewhat peculiar that Defendant raises this issue at all; if any of Plaintiffs' claims are unresolved, the Rule 54(c) language only benefits Defendant. Of course, all claims have been resolved as reflected in the record.

Finally, the Motion asks the Court to find that the short-term rental restriction is valid notwithstanding the reasoned analysis concerning the same in the Court's September 14th Ruling. Because the Motion's argument is muddled in that regard, Plaintiffs cannot address the argument other than to direct the Court to their prior arguments on that issue in the briefing on the preliminary injunction, motion for partial summary judgment, and cross-motion for partial summary judgment. While some say good legal writing should shy from idioms, undersigned will indulge himself. Much ink has been spilled over the short-term rental restriction already. Plaintiffs have nothing further to say than they have already said.

In any event, for all these reasons, Plaintiffs respectfully request that the Motion be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Trial court jurisdiction following the Notice of Appeal.

As an initial matter, Plaintiffs wish to highlight for the Court the potential issue with respect to its jurisdiction to *decide* the Motion.

The Arizona Supreme Court "has held that once an appeal is perfected, the trial court loses 'jurisdiction of each and every matter connected with the case, except in furtherance of the appeal.'" *In re Johnson*, 231 Ariz. 228, 230, 293 P.3d 504, 506 (App. 2012) (quoting *In re Lopez*, 97 Ariz. 328, 330-31, 400 P.2d 325, 326 (1965); *see also*

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Navajo Realty Co. v. County Nat'l Bank & Trust Co., 31 Ariz. 128, 135-36, 250 P. 885, 887 (1926)). Because the lower court loses jurisdiction once the appeal is perfected, any action it takes after perfection, other than in furtherance of the appeal, is void. *Id.* at 230-31, 293 P.3d 506-07 (after perfection there is "no discretion in the trial court for a determination of any sort as to the merits, the grounds or the timeliness of the filing of the appeal") (quoting *In re Lopez, supra*). Obviously, the Motion seeks to change the Final Judgment, which would impact the appeal, and therefore is not "in furtherance of the appeal."

At the same time, Plaintiffs recognize that ARCAP 9[1] contemplates the filing of a Rule 59 motion *after* an appeal is taken. Under ARCAP 9(e)(2), if a notice of appeal is filed while a Rule 59 motion is pending, the appellant must notify the appellate court of the pending motion when the appellate court assigns a case number. Upon the appellate court's receipt of that notice, the appeal is "suspended" until the Rule 59 motion is decided. The appellant must then notify the appellate court of the outcome of the motion, at which point the appeal is reinstated. The reason seems evident – once an appeal is perfected, the trial court is divested of jurisdiction over the matter. At the same time, the judicial policy is to allow litigants to persuade the trial court of any error so as to obviate the need for an appeal. *Baumann v. Tuton*, 180 Ariz. 370, 370, 884 P.2d 256, 258 (App. 1994).

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[1] As the Court is aware, ARCAP 9 addresses, among other things, the time within which to take an appeal. As the Court is further aware, the normal time to appeal can be extended by the filing of certain motions including a Rule 59 motion. The provisions of ARCAP 9 are quite clear in this regard, which makes Defendant's Notice to Court Re Appeal confusing. It is unclear why Defendant believes it needs clarification as to the date the Final Judgment was entered for purposes of bringing an appeal as that time would be extended if the Motion was timely. The ***real*** question is whether the ***Motion*** was timely because Rule 59 requires such motions to be filed within 15 days of the entry of judgment. Here, the Final Judgment states it was "docketed" by the Court on December 6, 2022, and it was served upon all counsel via email through the DoNotReply@courts.az.gov on the same date. Thus, while Plaintiffs would prefer that December 1st be the date of entry of the Final Judgment, as it would make the Motion untimely, it appears that December 6th was the date of entry by the Clerk notwithstanding the date the Final Judgment was signed by the Judge. If the Final Judgment was truly ***entered*** on December 1st, then the Motion is untimely.

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ARCAP 9(e)(2) strikes a balance between these two. However, until the provisions of the Rule are effectuated, this Court is divested of acting on any pending motions contemplated by that Rule.

B. Defendant disregarded the Court's order that Defendant lodge a form of final judgment so Defendant should not be heard to object to the form that Plaintiffs ultimately filed.

Defendant correctly notes that the Court did not invalidate the entirety of the First Amendment. Defendant further notes that *Kalway* suggests the trial court can "blue pencil" a restrictive covenant. Defendant overlooks a few things:

1. Defendant was **ordered** to lodge a form of final judgment by a date certain. Defendant **disregarded** that order.

2. To expedite resolution of this matter, after Defendant's deadline had expired,[2] Plaintiffs lodged a form of final judgment consistent with their requested relief under Count I.

3. However, in recognition of the Court's September 14th Ruling, Plaintiffs' form of judgment (the form of Final Judgment ultimately entered) **expressly allows Defendant to record a restrictive covenant addressing the same matters as the First Amendment PROVIDED THE NEW RECORDING IS CONSISTENT WITH THIS COURT'S RULING.**

In other words, rather than file the Motion (and not withstanding that Defendant failed to timely submit its own form of judgment and should thus be deemed to have waived any right to do so), Defendant could still get the same outcome it is requesting now.

Defendant could simply record the "blue-penciled" version of the First Amendment it deems appropriate and correct under the September 14th Ruling.

C. The record is clear as to the outcome of Count II and the Final Judgment is final under Rule 54(c).

The Complaint asserted two causes of action - Count I (declaratory and injunctive

[2] Plaintiffs attempted to come to a consensus with Defendant as to the form of Final Judgment. *See* Plaintiffs' Notice of Lodgment Re: Proposed Final Judgment at fn. 1 and Ex. B. For the Court's convenience, those email communications are attached to this Response as Exhibit 1.

relief to quiet title as to the First Amendment) and Count II (breach of implied covenant of good faith and fair dealing). As the Court ordered, Plaintiffs filed a Notice on November 23rd addressing Count II. The record is clear – Count II should be dismissed because it was mooted by Defendant's voluntary conduct in this case. The Final Judgment contains Rule 54(c) language of finality.

By operation of the foregoing, there is nothing left. Anything not expressly awarded or ordered under the Final Judgment has been adjudicated.

D. Redefining terms is not foreseeable.

Finally, it is not entirely clear what Defendant is attempting to argue under Section C of the Motion. Notwithstanding the fact that Defendant's argument and logic is difficult to follow, Defendant is clearly asking the Court to validate the short-term rental restriction under Section 2.30A of the First Amendment. For all the reasons argued by Plaintiffs in the motion and cross-motion for summary judgment, Plaintiffs dispute that a short-term rental restriction can be imposed.

E. Conclusion.

For all these reasons, Plaintiffs respectfully request that the Motion be denied. The Final Judgment should stand as entered.

DATED this 10th day of January, 2023.

DYER BREGMAN & FERRIS, PLLC

BY /s/
Stockton D. Banfield
Charles M. Dyer
Attorneys for Plaintiffs

WONG & CARTER, PC.

BY /s/
Rick K. Carter
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ORIGINAL electronically filed via TurboCourt
This 10th day of January, 2023.

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COPIES emailed and mailed
This 10th day of January, 2023 to:

Jack Cunningham
Jim Csontos
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Attorneys for Defendant

By: /s/ Kay Spates

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EXHIBIT 1

Matt Klopp

From: Matt Klopp
Sent: Friday, September 16, 2022 4:42 PM
To: Jim L. Csontos
Subject: Re: Gross v. The Shores

Given the circumstances, I do not believe I can agree to anything unilaterally and will need to see if I can get consent from my clients for an extension, which I can try to do as soon as you identify how long of an extension you would need.

From: Jim L. Csontos <jlc@jhkmlaw.com>
Sent: Friday, September 16, 2022 4:17 PM
To: Matt Klopp <mklopp@wongandcarter.com>
Subject: RE: Gross v. The Shores

The earliest I may meet with the Board is Oct. 6. A few of the Board members are out of state and out of the country at various times between now and then.

If you do not mind waiting and if you allow me to ask the Court for a short extension of the 20 days to lodge a form of judgment, I can meet with the Board on Oct. 6 and find out if I have some options to discuss.

Jim Csontos
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JHKM | JENNINGS HAUG KELEHER MCLEOD

From: Matt Klopp [mailto:mklopp@wongandcarter.com]
Sent: Friday, September 16, 2022 3:01 PM
To: Jim L. Csontos <JLC@jhc.law>
Subject: Gross v. The Shores

Jim:

Given the recent ruling from the Navajo County Superior Court, I thought that I would ask if you and your client want to discuss how to resolve what remains of this case before you incur more costs. If you prefer to simply proceed consistent with the Court's ruling, that is certainly within your client's right. I just figured that I would ask the question to see if there was any common ground before you submitted a form of Judgment that may lead to additional fighting.

If you could let me know one way or the other before the end of next week, that would be really helpful.

Thank you.

Sincerely,

Matthew A. Klopp

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